

FILED

CERT. U. S.

FILED

AUG 27 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-914

**SARAH SCHNEUR, Administratrix of The Estate of
SANDRA LEE SCHNEUR, Deceased,**

Petitioner,

—v.—

**JAMES RHODES, SYLVESTER DEL CORRAL, ROBERT CANTERSBURY, HARRY D. JONES,
JOHN E. MARTIN, RAYMOND J. SHIP, various officers and enlisted men, and
ROBERT WHITE,**

Respondents.

ON A WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

Of Counsel:

**STANLEY K. LAUGHLIN
NIKI Z. SCHWARTZ
MICHAEL S. HARRISMAN
American Civil Liberties Union
of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215**

**WALTER S. HOFFNER
1008 Standard Building
Cleveland, Ohio 44113**

**MICHAEL E. GELTNER
LEONARD J. SCHWARTZ
American Civil Liberties Union
of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215**

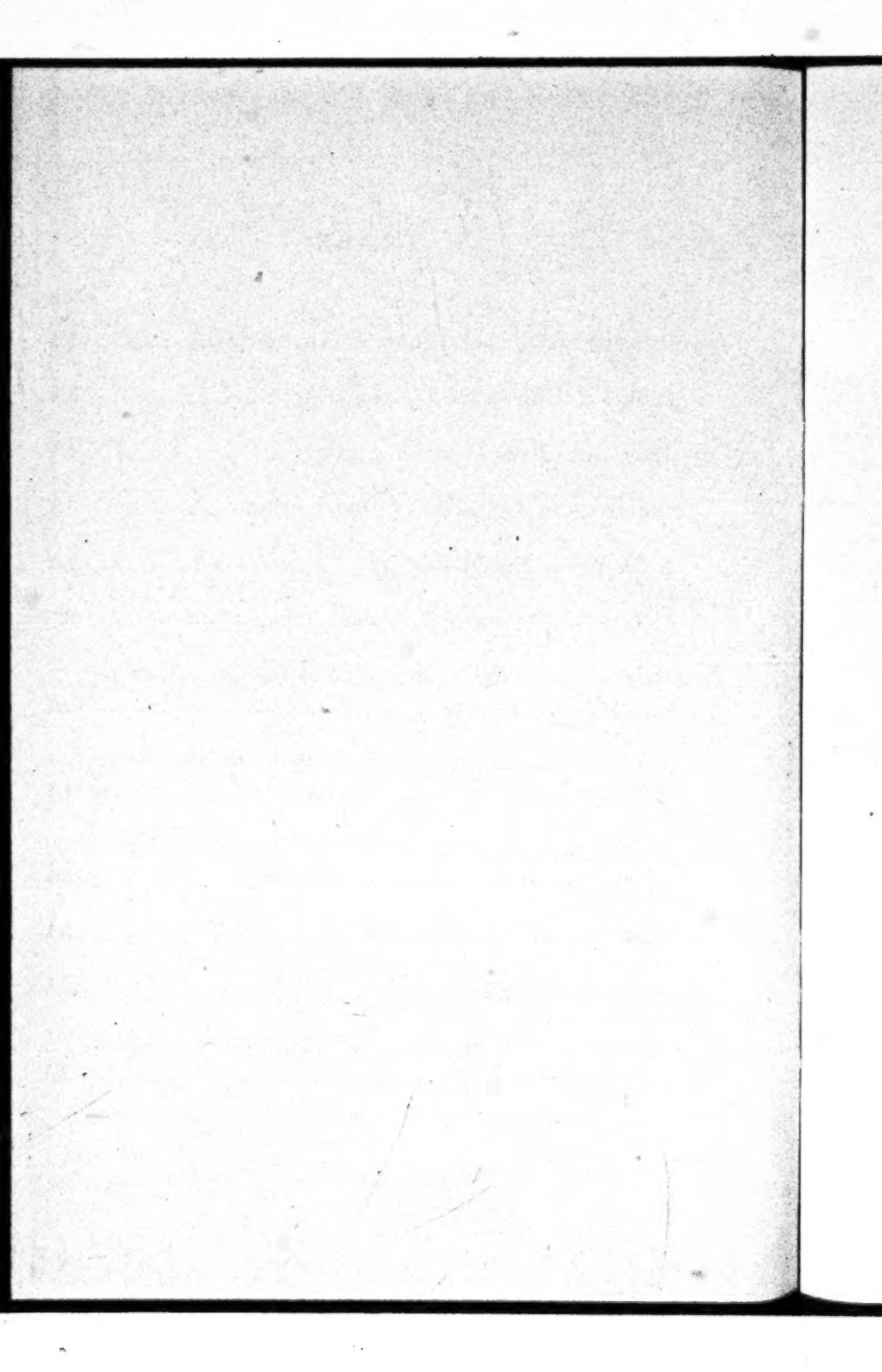
**MELVIN L. WOLF
JOEL M. GORA
American Civil Liberties Union
Foundation, Inc.
22 East 40th Street
New York, New York 10016**

**NELSON G. KARL
33 Public Square
Suite 210
Cleveland, Ohio 44113**

Attorneys for Petitioner

INDEX

	PAGE
Docket Entries in the Court of Appeals	1A
Docket Entries in the District Court	3A
Judgment of the Court of Appeals	4A
Reference to Judgment of District Court	6A
Reference to Complaint	7A
Motion to Dismiss of Defendant James Rhodes	8A
Reference to Exhibits to Motion to Dismiss of Defendant James Rhodes	10A
Motion to Dismiss of Defendants Sylvester Del Corso, Robert Canterbury and Robert White	11A
Motion to Dismiss of Defendants Harry D. Jones, John E. Martin and Raymond J. Srp	13A
Reference to Opinion and Order of District Court	15A
Reference to Opinion of Court of Appeals	16A
Synopsis of Pertinent Material Filed in United States Supreme Court	17A



APPENDIX

Docket Entries in the United States Court of Appeals for the Sixth Circuit

71-1624

DATE

FILINGS—PROCEEDINGS

1971

Aug. 3 *Certified record* (1 vol. pleadings), filed; and
cause docketed

" 5 Appearance of counsel for Appellees

" 6 Appearance of counsel for Appellant

" 11 Appearance of counsel for Appellant

" 19 Appearance of counsel for Appellant

Sept. 9 Twenty-five copies of Brief for Appellant

" 9 Ten copies of Joint Appendix

" 9 Proof of service of brief for Appellant and joint
appendix

Oct. 7 Twenty-five copies of Brief for Appellee, with
proof of service

" 14 Twenty-five copies of Brief for Appellee, Gov.
J. A. Rhodes, with proof of service

" 21 Twenty-five copies of Reply Brief for Appellant

" 21 Proof of service of reply brief for Appellant

Dec. 7 Motion of Appellant to advance case for hearing,
with proof of service (Motion granted. It is
ordered that this case be scheduled for oral
argument during the February, 1972, session
of this Court. Phillips, J.)

*Docket Entries in the United States Court of Appeals
for the Sixth Circuit*

DATE

FILINGS-PROCEEDING.

1972

- Feb. 7 Cause argued and submitted (Before: Weick,
Celebrezze and O'Sullivan, JJ.) T-317
- Nov. 17 Judgment of the District Court affirmed
- " 17 Opinion by Weick, J. (O'Sullivan, J., concurring)
[Celebrezze, J. dissenting]
- Dec. 29 Notice of filing petition for certiorari on 12/21
(Sup.Ct. 72-914)

1973

- Feb. 9 Mandate issued (No costs taxed)
Opinion with mandate

**Docket Entries in the United States District Court for the
Northern District of Ohio, Eastern Division**

Relevant Docket Entries

September 8, 1970	Complaint filed
November 16, 1970	Motion of defendants Del Corso, Canterbury and White to dismiss with Memo in support filed
November 16, 1970	Motion of defendant James A. Rhodes, Governor, to dismiss with memorandum filed
January 22, 1971	Memorandum of Law of plaintiff in opposition to motion to dismiss filed
April 15, 1971	Motion of defendants, Major Harry D. Jones, Captain Raymond J. Srp and Captain John E. Martin, to dismiss with memorandum filed
May 14, 1971	Memorandum of plaintiff opposing motions to dismiss filed
June 2, 1971	Memorandum and Order filed. Connell, J., Complaint dismissed at plaintiff's cost
June 29, 1971	Notice of Appeal by plaintiff filed

**Judgment of the United States Court of Appeals
for the Sixth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1624

**SARAH SCHEUER, Administratrix of the estate of
Sandra Lee Scheuer, deceased,**

Plaintiff-Appellant,

—v.—

**JAMES RHODES, Governor of the State of Ohio, SYLVESTER
DEL CORSO, ADJUTANT GEN., ROBERT CANTERBURY, Assist-
ant Adjutant, HARRY D. JONES, JOHN E. MARTIN, RAY-
MOND J. SRP, VARIOUS OFFICERS and ENLISTED MEN,
who are members of G. Company, 107 the Armored
Cavalry Regiment of the Ohio National Guard and
A. Company First Battalion 145th Infantry Regiment
of the Ohio National Guard, ROBERT WHITE, President,
Kent State University,**

Defendants-Appellees.

Before:

**WEICK and CELEBREZZE, Circuit Judges and
O'SULLIVAN, Senior Circuit Judge**

**Appeal from the United States District Court
for the Northern District of Ohio.**

*Judgment of the United States Court of Appeals
for the Sixth Circuit*

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

Issued as Mandate:

Costs: None

Filing fee \$ —

Printing \$ —

Total \$ —

A True Copy.

Attest:

JAMES A. HIGGINS, Clerk

Reference to Judgment of the District Court

The order of the United States District Court for the Northern District of Ohio, Connell, J., dismissing the complaint is contained in the terminal portion of the court's opinion. The opinion is in the appendix to the petition for a writ of certiorari (which is attached to the petition) and is at page 70a.* The order is at 82a.

* References in this Appendix to the appendix attached to the petition for a writ of certiorari will hereafter be made as ____a. Cross-references to pages of *this* Appendix and references in the brief will hereafter be made as ____A.

The Complaint

The complaint in this action is printed in the appendix to the petition for a writ of certiorari at 83a.

Motion to Dismiss of Defendant James Rhodes
IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. C70-859

SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,
Plaintiff,

—v.—

JAMES RHODES, ETC., et al.,
Defendants.

1. Now comes the defendant, James A. Rhodes, Governor of the State of Ohio, and respectfully moves this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing the several alleged causes of action in the complaint herein for the reasons:

- (1) The Court lacks jurisdiction of the subject matter, because this defendant is sued in his representative capacity as a public official and agent of the sovereign state of Ohio; therefore, the action is one essentially against the State of Ohio which has not consented to be sued by waiving its constitutional right to sovereign immunity;

Motion to Dismiss of Defendant James Rhodes

- (2) That, as a matter of law, it affirmatively appears from the complaint of plaintiff that, while no negligent, willful or wanton act of defendant James A. Rhodes, Governor, has been committed, it further affirmatively appears that any act or omission on the part of Governor James A. Rhodes, defendant herein, was remote from the injury to and death of plaintiff's decedent, and was separated therefrom by a substantial intervening cause.

Respectfully submitted,

TOPPER, ALLOWAY, GOODMAN,
DeLEONE & DUFFEY

By /s/ R. BROOKE ALLOWAY
R. Brooke Alloway,
*Attorneys for Defendant
James A. Rhodes, Governor
of the State of Ohio*

**Reference to Exhibits to Motion to Dismiss
of Defendant James Rhodes**

Two Exhibits were attached to Defendant Rhodes' motion to dismiss. They were reprinted in their entirety in the opinion of the Court of Appeals as an appendix to the opinion of Judge Weick. The exhibits were reprinted in the appendix to the petition for a writ of certiorari as part of Judge Weick's opinion at pages 23a and 25a.

**Motion to Dismiss of Defendants Del Corso,
Canterbury and White**

**IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Civil Action No. C70-859**

**SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,**

Plaintiff,

v.

JAMES RHODES, et al.,

Defendants.

MOTION TO DISMISS

Now come the defendants and respectfully move this Court, pursuant to Rule 12 b(1) of the Federal Rules of Civil Procedure, for an order dismissing two causes of action in the complaint herein because the Court lacks jurisdiction of the subject matter. These defendants are sued in their representative capacities as public officials and agents of the sovereign state of Ohio. Because it appears from the body of the complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, the action is one essentially against the State of

*Motion to Dismiss of Defendants Del Corso, Canterbury
and White*

Ohio which has not consented to be sued by waiving its constitutional right to sovereign immunity.

Respectfully submitted,

CRABBE, NEWLON, POTTS, SCHMIDT,
BROWN & JONES

42 East Gay Street
Columbus, Ohio 43215
Telephone: 228-5511

By CHARLES E. BROWN
Attorney for Defendants

Motion to Dismiss of Defendants Del Corso,

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. C70-859

**SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,**

Plaintiff,

—v.—

JAMES RHODES, Governor of The State of Ohio, et al.,

Defendants.

MOTION TO DISMISS

Now come the defendants, Major Harry D. Jones, Captain Raymond J. Srp, and Captain John E. Martin, duly commissioned officers of the Ohio National Guard, and respectfully move this Court, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure for an order dismissing the Complaint herein because the Court lacks jurisdiction of the subject matter:

- (a) These defendants are sued in their representative capacity as military officers and agents of the sovereign State of Ohio, because it appears from the caption and the body of the Complaint that the matter involved is one in which the State of Ohio

Motion to Dismiss of Defendants Jones, Martin and Srp

is primarily concerned and will be affected by any judgment rendered herein, and the action is essentially against the State of Ohio, and the State of Ohio has not consented to be sued by waiving its constitutional right to sovereign immunity.

- (b) Aside from Ohio being the real party in interest and therefore being immune to civil suits, defendants are thus immune to civil suits by the statutory law of the State of Ohio.
- (c) It is evident from the body of the Complaint that while no negligent, willful, wanton actions of these defendants has been committed, and it affirmatively appears from the body of the Complaint that any act or omission to act by these defendants was remote from the injury to and death of plaintiff's decedent and was separated therefrom by a substantial intervening cause.

BERGER, KIRSCHENBAUM & LAMBROS

By C. D. LAMBROS *Of Counsel*

806 Citizens Building
Cleveland, Ohio 44114
621-0800

Attorneys for Captain Raymond J. Srp

DELMAR A. CHRISTENSEN

607 Second National Building
Akron, Ohio

*Attorney for Major Harry D. Jones
and Captain John E. Martin*

Reference to Opinion and Order of District Court

The opinion and order of the District Court is printed in the appendix to the petition for a writ of certiorari at 70a.

Reference to Opinion of Court of Appeals

The opinion of the Court of Appeals is printed in the appendix to the petition for a writ of certiorari at 1a. Judge Weick's opinion starts at 3a, Judge O'Sullivan's concurring opinion starts at 27a and Judge Celebrezze's dissenting opinion begins at 32a.

**Synopsis of Pertinent Material Filed in
United States Supreme Court**

To date, the following has been filed in this Court in this case:

1. Petition for a writ of certiorari.
2. Brief of Respondents Del Corso, Canterbury, Jones, Martin, Srp and White in opposition to petition for writ of certiorari.
3. Brief of Respondent Rhodes in opposition to petition for writ of certiorari.
4. Petitioner's reply brief in support of issuance of writ of certiorari.

The writ of certiorari in this case was granted at the same time as that in *Krause v. Rhodes*, No. 72-1318 and the cases were set for argument in tandem.

LIBRARY
SUPREME COURT, U. S.

FILED

AUG 24 1973

MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

October Term, 1973

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, et al.,
Petitioners,

vs.

JAMES RHODES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Certiorari Filed March 23, 1973
Certiorari Granted June 25, 1973

Supreme Court of the United States

October Term, 1973

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, et al.,
Petitioners,

vs.

JAMES RHODES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

Docket Entries and Documents in Krause Case

Relevant Docket Entries	1
Amended Complaint (July 6, 1970)	3
Motion to Dismiss and, in the Alternative, Motion for Change of Venue Filed on Behalf of Defendants Del Corso and Canterbury, with Memorandum of Law in Support of Motion and Attached Affidavits and Proclamations of the Governor (Aug. 17, 1970)	8
Motion to Dismiss Filed on Behalf of Defendant James Rhodes, with Attached Memorandum in Support of Motion (Aug. 17, 1970)	34

II

Memorandum of Law on Behalf of Plaintiff in Opposition to Defendants' Motion to Dismiss (Jan. 18, 1971)	41
Answers to Interrogatories by Defendants Del Corso and Canterbury (May 7, 1971)	67

Docket Entries and Documents in Miller Case

Relevant Docket Entries	81
Complaint (Aug. 24, 1970)	82
Motion to Dismiss Filed on Behalf of Defendants Del Corso, Canterbury and White (Nov. 16, 1970)	87
Motion to Dismiss Filed on Behalf of Defendant James Rhodes (Nov. 16, 1970)	88
Motion to Dismiss Filed on Behalf of Defendants Jones, Srp and Martin (Apr. 15, 1971)	90

Notated References to Opinions and Judgments Below, Krause and Miller Cases

Memorandum and Order of District Court, Krause and Miller Cases (June 2, 1971)	93
Opinion of Court of Appeals, Krause and Miller Cases (Nov. 17, 1972)	94
Judgment of Court of Appeals in Krause Case (Nov. 17, 1972)	95
Judgment of Court of Appeals in Miller Case (Nov. 17, 1972)	95
Order of Court of Appeals Denying Petition for Rehearing, Krause and Miller Cases (Jan. 3, 1973)	96

Civil Action No. C-70-544

In the United States District Court

**FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ARTHUR KRAUSE,
Administrator of the Estate of Allison Krause,
Deceased,
Plaintiff,

VS.

GOVERNOR JAMES RHODES, et al.,
Defendants.

RELEVANT DOCKET ENTRIES

Proceedings

- 6/10/70 Complaint filed. Summons issued. 3 copies of each to Marshal.
- 7/ 6/70 Amended Complaint filed.
- 7/15/70 Summons retn. & filed. Served Robert Canterbury 7/1/70; served James Rhodes and Sylvester Del Corso 6/22/70. Fees \$12.48.
- 8/11/70 Summons ret. & filed. Served Sylvester Del Corso & Robert Canterbury on 7/30/70; Served Gov. Rhodes on 7/28/70. Fees, \$12.48.
- 8/17/70 Motion of defts. DelCorso, and Canterbury to dismiss or in alternative for change of venue with memorandum in support filed. Copies mailed 8/14/70.

- 8/17/70 Motion of deft. Gov. Rhodes for change of venue with memo. in support filed. Copies mailed 8/14/70.
- 8/17/70 Motion of deft. Gov. Rhodes to dismiss with memo. filed. Copies mailed 8/14/70.
- 9/22/70 Interrogatories of plaintiff to defts., Governor James Rhodes, Sylvester Del Corso, and Robert Canterbury, filed. Copies mailed 9/21/70.
- 1-18-71 Memorandum of law on behalf of plaintiff in opposition to deft's motion to dismiss filed. Copy mailed 1-19-71.
- 3- 5-71 Memorandum of the plaintiff in opposition to defendants' motion for change of venue filed. Oral hearing requested. Copy mailed 3-5-71.
- 3-16-71 Notice of the plaintiff of the taking of the depo. of Raymond Srp on 3-30-71 filed.
- 3-16-71 Motion of the plaintiff to compel defendants to answer interrogatories filed. Copy mailed 3-15-71.
- 4- 4-71 Motion of the plaintiff to compel witness to answer questions pursuant to R. 37 filed. Copy mailed 5-4-71.
- 5- 6-71 Answers of Gov. James Rhodes to pltf's interrogatories filed. Copy mailed 5-4-71.
- 5- 7-71 Answers of Defts. DelCorso and Canterbury pltf's interrogatories filed. Copies mailed 5-5-71.
- 5/27/71 Deft's Memorandum contra motion to compel *witness to answer to Fed. rules of Civil Procedure, Rule 37 filed. Copy mailed 5/26/71.
*(witness Captain Raymond Srp)
- 6/ 2/71 Memorandum & Order filed. Connell, J. Complaint Dismissed at Pltf's cost. Copies to interested counsel.

- 6/25/71 Notice of Appeal by Pltff filed. Copies to Alloway, Brown & Sindell.
- 8/11/71 Certified record received in U.S.C.A. & filed 8/8/71. Case No. 71-1622.
- 2/12/73 True copy of Judgment from U. S. Court of Appeals affirming judgment of District Court filed.
- 2/12/73 Opinion from U. S. Court of Appeals filed. (Record Returned)

AMENDED COMPLAINT IN KRAUSE CASE

(Filed July 6, 1970)

Civil Action No. C 70-544

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

(Title omitted in printing)

**AMENDED COMPLAINT FOR DAMAGES UNDER
U.S.C. TITLE 42, SECTION 1983, AND
FOR WRONGFUL DEATH**

FIRST CAUSE OF ACTION

1. Plaintiff Arthur Krause is a citizen of the United States who resides in Churchill Borough, Pennsylvania, and is the only qualified, appointed and acting Administrator of the Estate of Allison Krause.

2. Allison Krause, plaintiff's decedent, was at all times hereinmentioned the daughter of plaintiff Arthur Krause,

and plaintiff's decedent was at all times hereinmentioned a citizen of the United States, and was an enrolled student at Kent State University.

3. Defendant Governor James Rhodes at all times hereinmentioned was the Governor and Chief Executive of the State of Ohio and the Ohio National Guard was under his command, authority, and control.

4. At all times hereinmentioned defendant Sylvester Del Corso was the Adjutant General of the Ohio National Guard, which is the military force of the State of Ohio.

5. Defendant Robert Canterbury was at all times hereinmentioned the Brigadier General and Assistant Adjutant General of the Ohio National Guard and was in direct command and control of the national guardsmen in question at the time of the occurrence referred to hereinafter.

6. This action arises under United States Code Title 42, Section 1983, and under the United States Constitution, which guarantees to all citizens Equal Protection of the Laws and Due Process of Law.

7. At all times hereinmentioned all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

8. On or about May 4, 1970, defendants individually and jointly ordered units of the Ohio National Guard onto the Campus of Kent State University, which is an educational institution operated and controlled by the State of Ohio, and which is located in Portage County, in the State of Ohio.

9. Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

- (a) Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place; and
- (b) Defendants knew said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and
- (c) Defendants knew that the presence of such troops, so improperly trained, and so armed, under the circumstances created an unreasonable danger on the campus of Kent State University, creating an imminent risk of injury and death to all students then on the campus, including plaintiff's decedent, Allison Krause.

10. The ordering of these improperly trained and armed troops onto the Kent State Campus, on the part of these defendants in complete and utter indifference and disregard for the lives of students on the Kent State Campus, including plaintiff's decedent Allison Krause, constituted culpable, gross, wanton and reckless misconduct under the circumstances and arbitrarily, discriminatorily and capriciously deprived plaintiff and plaintiff's decedent of their rights to Equal Protection of the Laws and Due Process of Law guaranteed under the United States Constitution.

11. On the afternoon of May 4, 1970, a group of students gathered together on the campus of Kent State University. Plaintiff's decedent, Allison Krause, was present at or near the gathering of students but at no time did she engage in any provocation or form of violence towards any individual or national guardsman. At the time, the national guardsmen, as described above, under the command of defendant Robert Canterbury were present on the Campus. Suddenly and without warning

and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, intentionally, willfully, wantonly and maliciously disregarding the lives and safety of students, spectators, passers-by, and other individuals lawfully on the campus, including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, from which wound she eventually died, thereby depriving her of her life without Due Process of Law, and in violation of her right to Equal Protection of the Laws. At no time did defendant Robert Canterbury take any action whatsoever to prevent his troops from so conducting themselves, and such failure under the circumstances then and there existing was an intentional act committed in willful, wanton, reckless and callous disregard and indifference for the lives of civilians present on the Campus of Kent State University, including plaintiff's decedent, Allison Krause.

12. All acts hereinmentioned were done individually and in conspiracy by these defendants and by other unknown persons with the specific intent of depriving plaintiff and plaintiff's decedent of their rights to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

13. Plaintiff says that he and his family suffered great grief and distress as the result of the wrongful death of his daughter, who herself suffered conscious pain prior to her death, and that he and other beneficiaries had an interest in the life of the decedent, Allison Krause.

SECOND CAUSE OF ACTION

1. By this reference plaintiff incorporates all of the allegations of the First Cause of Action as though those allegations were fully set forth herein at this point.

2. For this Second Cause of Action, plaintiff says that he is a citizen of the State of Pennsylvania, and that defendants are all citizens of the State of Ohio, and that this Court has jurisdiction of this Second Cause of Action by virtue of the diversity of citizenship of the parties.

3. Defendants ordered troops which they knew, or in the exercise of ordinary care should have known, were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

- (a) Defendants knew, or in the exercise of ordinary care should have known, that there was no cause, or insufficient cause, for sending armed troops at said time into said place; and
- (b) Defendants knew, or in the exercise of ordinary care should have known, that said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and
- (c) Defendants knew, or in the exercise of ordinary care should have known, that the presence of such troops, so improperly trained, and so armed, under the circumstances created an unreasonable danger on the Campus of Kent State University, creating an imminent risk of injury and death to all students then on the Campus, including plaintiff's decedent, Allison Krause.

4. The ordering of these improperly trained and armed troops onto the Kent State Campus on the part of these defendants was negligent and careless, and the negligence and carelessness of these defendants as hereinabove alleged directly and proximately caused the wrongful death of plaintiff's decedent, Allison Krause.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for compensatory damages in the sum of ONE MILLION DOLLARS (\$1,000,000.00), together with the costs of this action.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for punitive damages in the sum of FIVE MILLION DOLLARS (\$5,000,000.00), together with the costs of this action.

/s/ STEVEN A. SINDELL
SINDELL, SINDELL, BOURNE, MARKUS
STERN & SPERO
1400 Leader Building
Cleveland, Ohio 44114
781-8700

**MOTION TO DISMISS AND ATTACHMENTS
IN KRAUSE CASE**

(Filed August 17, 1970)

Civil Action No. C-70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

**MOTION TO DISMISS AND, IN THE ALTERNATIVE,
MOTION FOR CHANGE OF VENUE**

1. Now come the defendants Major General Sylvester Del Corso, Adjutant General of the State of Ohio, and Brigadier General Robert Canterbury, Assistant Adjutant General of the State of Ohio, and respectfully move this Court, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, for an order dismissing both causes of action in the amended complaint herein because the Court lacks jurisdiction of the subject matter:

(A) These defendants are sued in their representative capacity as military officers and agents of the sovereign state of Ohio. Because it appears from the body of the amended complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, the action is one essentially against the State of Ohio which has not consented to be sued by waiving its constitutional right to sovereign immunity.

(B) Aside from Ohio being the real party in interest and therefore immune to civil suit, defendants Adjutant General Del Corso and Brigadier General Canterbury are themselves immune to civil suit by the statutory law of Ohio which this Court is obligated to follow.

2. Defendants Adjutant General Del Corso and Brigadier General Canterbury further move this Court, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's second cause of action in the amended complaint herein because the second cause of action fails to state a claim upon which relief can be granted.

3. In the alternative, defendants Adjutant General Del Corso and Brigadier General Canterbury move this Court to transfer this action to the United States District Court for the Southern District of Ohio pursuant to Title 28, U.S.C.A. Section 1404 (a), for the convenience of the parties, the welfare of the state, and in the interest of justice. As more clearly appears in the affidavits of Adjutant General Del Corso and Brigadier General Canterbury, hereto attached and marked as Exhibits A and B respectively, the injury set forth in the amended complaint herein arose in greatest portion in the southern judicial district of Ohio; defendants are officials of the State of Ohio with the welfare of this state demanding their con-

stant presence in the capital; and the vast majority of records needed for the trial of this lawsuit are found in the southern district of this state.

Respectfully submitted,

CRABBE, NEWLON, POTTS, SCHMIDT,
BROWN & JONES

By /s/ CHARLES E. BROWN
Trial Attorney

**MEMORANDUM IN SUPPORT OF MOTION TO
DISMISS AND, IN THE ALTERNATIVE, MOTION
FOR A CHANGE IN VENUE**

During the evening hours of May 2, 1970, the Mayor of Kent, Ohio, Leroy M. Satrom, called the Governor's office of this state to report that violence and civil disorder existed in Kent, Ohio. Because available law enforcement was inadequate to suppress the eminent public danger threatening Kent and its citizens, Mayor Satrom requested that Governor Rhodes order the Ohio National Guard to his city. Governor Rhodes, acting in consideration of Mayor Satrom's request for aid, authorized the Adjutant General of this state:

"to maintain peace and order in the City of Kent and on the campus of Kent State University in Portage County . . . and through him the commanding officer of any organization of said militia is . . . ordered to take action necessary for the restoration of order in the city and on the campuses aforesaid. (Executive Proclamation issued 5 May, 1970, supplementing Executive Proclamation of 29 April, 1970, marked Exhibit 3 and attached hereto).

It was from the circumstances of public danger and the responsive Executive Proclamation that plaintiff's alleged cause of action arises.

MOTION TO DISMISS

1. A. The first part of this memorandum is submitted in support of defendants' motion to dismiss this action, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, on the ground that this Court lacks jurisdiction over the subject matter. Adjutant General Del Corso and Brigadier General Canterbury were acting in their official representative capacities as military officers and agents of the sovereign State of Ohio at the time plaintiff's alleged cause of action arose. It is defendants' position that because they are sued in their official capacities, they are immune from suit.

The first cause of action is brought by authority of Title 42, U.S.C.A. Section 1983, against Adjutant General Del Corso and Brigadier General Canterbury. Although this federal provision provides a basis for bringing such an action under certain circumstances, the statute must be read in harmony with the federal constitution's guarantees and protections. The Eleventh Amendment to the Constitution of the United States commands that the doctrine of state immunity be part of the American jurisprudence saying:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . . (Amendment XI U.S. Constitution.)

Hence, Congress is without power to enlarge the jurisdiction of the federal district courts to include suits against

the sovereign states; Title 42, U.S.C.A. Section 1983, cannot be read to this end.

A reading of the statute itself and the decisions interpreting it make clear that Section 1983 is not in derogation of the Eleventh Amendment nor the common-law immunity of sovereign states. It was exactly such a suit as this against a sovereign state through its officials as nominal parties that Congress tried to prevent when this federal statute was drafted. The language of the statute confirms this conclusion when it specifically states "every person . . . shall be liable". (Emphasis added.) It would not only be unconstitutional for this Court to permit plaintiff to sue the State of Ohio under the guise of naming these defendants as nominal parties but it would clearly violate the expressed intent of Congress. This statute has been similarly interpreted in the case of *Fowler v. United States*, (C. D. Cal. 1966) 258 F. Supp. 638 in which the court stated at page 646:

"Turning now to the State of California, it is clear that the word 'persons' as used in the Civil Rights Acts (42 U.S.C.; 1983) does not include a state or its governmental subdivisions, acting in its sovereign, as distinguished from its proprietary capacity. *Hewitt v. City of Jacksonville*, 188 F. 2d 423, 424 (C.A. 5th 1951), cert. den. 342 U.S. 835, 72 S. Ct. 58, 96 L.ed. 631 (1951); *Sires v. Cole*, 320 F. 2d 877, 879 (C.A. 9th 1963)."

And in headnote 16, of *Fowler v. United States*, *Ibid*, the state's immunity is applied equally to the state's officials:

"Civil Rights Statutes do not afford any basis for civil actions . . . against public officers acting in their official capacities in good faith and in pursuance of federal or state law. 42 U.S.C.A. Sections 1981-1985, 1988.

The *Fowler* decision defines the policy behind the doctrine of sovereign immunity which, although expressed in terms of the federal government's immunity, is also relevant to a state's immunity from suit given the Eleventh Amendment protections. Again at page 646 the court states:

"The reason for this rule is a simple and fundamental matter of policy which, in the words of Judge Learned Hand in *Greogoire v. Biddle*, 177 F. 2d 579, 580-581 (C.A. 2d 1949) is to permit public officers to act unflinchingly in the discharge of their duties without a constant dread of retaliation.

[17, 18] But even more important than these considerations is the fact that, with respect to defendant United States of America, the well-established principle of law summed up in the phrase, 'doctrine of sovereign immunity', stands as an unalterable and impregnable barrier between plaintiff and any injunctive relief against this defendant.

Nor can the plaintiff evade the doctrine of sovereign immunity by claiming that this suit is one against officers of the United States, since a suit against such officers is, in effect, a suit against the United States itself and must fail because of the government's immunity from suit. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S.Ct. 1457, 93 L.Ed. 1628 (1948); *Maline v. Bowdoin*, 369 U.S. 643, 647, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); 10 L.Ed. 2d 15 (1963).

Stated another way, the sovereign cannot be sued without its consent and any possible waiver of this immunity, as for instance in the Federal Tort Claims Act (28 U.S.C. Sections 1346(b), 2671-2680), must

be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 589, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *Wallace v. United States*, 142 F.2d 240, 243 (C.A. 2d 1944), cert. den. 323 U.S. 712, 65 S.Ct. 37, 89 L. Ed. 573 (1944); *Candell v. United States*, 189 F. 2d 442, 444 (C.A. 10th, 1951.)"

As expressed in the *Fowler* case, agents and representatives of a sovereign state are equally immune to civil liability with Section 1983 being no exception to this Rule. The historical immunity of state officials relative to Section 1983 is considered in the case of *Kenney v. Killian*, (W. D. Mich. 1955) 133 F. Supp. 571 at page 578 where the court concludes:

"This statute was originally enacted by the Congress in the turbulent days of reconstruction following the Civil War. Since then it has remained in a rather dormant state and has not been substantially revised or modified. It is only in comparatively recent years that resourceful plaintiffs and lawyers have invoked this statute as a basis for civil actions for money damages against public officials acting in the course of their official duties. Although the statute remains on the books and in force, it certainly seems clear that the Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities, in good faith and in pursuance of State law. See *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019; *Francis v. Lyman*, 1 Cir., 216 F.2d 583; *Ginsburg v. Stern*, D.C., 125 F.Supp. 596, affirmed, 3 Cir., 225 F.2d 245, by the Court of Appeals for the Third Circuit."

The case of *Dunn v. Estes*, (D.C. Mass. 1953) 117 F. Supp. 146 further affirms that the use of the word "person" in Section 1938 did not destroy the immunity of public officials. Headnote 2 of this case states:

"Civil Rights Act, notwithstanding the use of the phrase 'every person' does not destroy immunity of public officials from civil liability for consequences of performance of their official duties. 42 U.S.C.A. Section 1983, 1965(3)."

Further, in the *Dunn* decision at page 148 it is stated:

... if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law.

It is clear that Adjutant General Del Corso and Brigadier General Canterbury are agents of the sovereign state of Ohio and, therefore, a suit brought against these agents of Ohio is, in reality, a suit against their sovereign principal. The agency relationship between Ohio and these defendants in the situation at bar is beyond doubt.

Article IX of the Ohio Constitution provides for the militia and further provides in Article III, Section 10, that this state's governor shall be commander-in-chief of the military forces of the State. In accordance with Article IX, Section 3, the governor is to appoint the Adjutant General of the military force and pursuant to Section 5919.02 O.R.C., Brigadier General Canterbury is likewise an agent of the state appointed through its commander-in-chief. At the time plaintiff's alleged cause of action

arose, not only were defendants agents of the sovereign state, but had been called to active duty by the governor of Ohio under authority of Article IX, Section 4, of the Ohio Constitution and Section 5923.231 of the Ohio Revised Code. The fact of agency is affirmed by plaintiff's amended complaint.

Justice Harlan stated in *Maryland, et al. v. United States*, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed. 2d 205 (1965) at 14 L.Ed. 2d page 210 with reference to the relationship between national guard personnel and the state exercising control over them:

"Their appointment by state authorities and the immediate control exercised over them by the states make it apparent that military members of the Guard are employees of the States, and so the courts of appeal have uniformly held."

It is apparent from a reading of the amended complaint that plaintiff is not suing these defendants in their individual capacity but rather is suing them as state officials, acting as representatives of Ohio at the time the injury occurred pursuant to their duties on behalf of the state under executive order. (See Exhibit 3).

The fact that the State of Ohio is a real and primary party defendant in this action is substantiated by guidelines laid down by the Supreme Court of the United States in the case of *Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1944). Although this case was not brought under Section 1983, Justice Reed's opinion discusses the realities of sovereign immunity. It is there written in the headnotes:

"Where an action is authorized by statute against a state officer in his official capacity and constituting an action against the State, the Eleventh Amend-

ment operates to bar suit in the Federal Courts except insofar as the state waives state immunity from suit.

"The Eleventh Amendment, which provides that the judicial powers of the United States shall not be construed to extend to any suit against a state, denies to the Federal Courts authority to entertain a suit brought by private parties against a state without its consent.

"The nature of a suit against a state officer as one against a state within the operation of the Eleventh Amendment is to be determined by its *essential nature and effect*." (Emphasis added.)

There is little doubt that by the *nature* of this action and its possible *effects* the State of Ohio is the real and the primary party in interest. The litigation would ultimately determine and interpret the constitutional and statutory rights, obligations, and powers of this sovereign when confronted by a future riot situation. Although Adjutant General Del Corso and Brigadier General Canterbury are today the officials in command, the possible outcome and effect of the litigation would be much broader and more far-reaching than the interests of these nominal defendants. The interests of this sovereign state are primarily involved subjecting the State of Ohio to a lawsuit which is violative of her Eleventh Amendment rights.

Although a sovereign may waive immunity and consent to being sued, it is a matter of the state's own constitutional and/or statutory procedure as to how and when such a waiver is to be accomplished. Unless this state procedure is followed, a waiver of the state's immunity cannot be claimed.

In order to decide the jurisdictional question posed by defendants' motion to dismiss, it needs be determined if the sovereign state of Ohio has consented to the suit or waived its immunity. As to whether there has been such a waiver or consent to suit, the law of the sovereign holding the privilege must be considered.

Section 16, Article I, Ohio Constitution provides:
"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

This constitutional provision is interpreted in the Ohio Supreme Court case of *Randabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1916) holding *inter alia* that:

"The provision of the Ohio Constitution, Article I, Section 16 . . . is not self-executing; and statutory authority is required as a prerequisite to the bringing of suit against the state."

This rule has been consistently followed in subsequent Ohio cases. See: *State ex rel. Williams v. Glander*, 143 Ohio St. 188, 74 NE 2d 32 (1947); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49, 162 NE 2d 475 (1959).

The United States Supreme Court case of *Palmer v. Ohio*, 248 U.S. 32, 64 L.Ed. 108, 39 S.Ct. 16 (1918) is determinative. It is there stated in the headnotes:

1. The right of individuals to sue a state in either a Federal or State court cannot be derived from the constitution or laws of the United States, but only from the consent of the State.
2. Whether a state has given by a constitutional amendment the consent necessary to permit suit to be brought against it is a question of local state law as to which the decision of the highest state court is con-

trolling with the Federal Supreme Court where no Federal question is invoked.

3. Persons suing a state for damages are not deprived of their property without compensation, in violation of the 5th Amendment of the Federal Constitution, by a decision of the court that the state had not consented to be sued.

Therefore, the rule announced by the Supreme Court of Ohio in *Randabaugh* and consistently followed in Ohio is now controlling in this federal forum. The sovereign state of Ohio has not waived its immunity and has not consented to be sued in this instance.

1. B. Aside from Ohio's sovereign protection of immunity from civil suit based upon Eleventh Amendment guarantees, Adjutant General Del Corso and Brigadier General Canterbury are themselves immune to civil suit in a federal tort action by Section 2923.55 of the Ohio Revised Code.

"Section 2923.55 Death or injury of rioter by use of necessary force.

Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense."

That Section 1983, Title 42, U.S.C.A. is to be read in the context of tort liability is certain. Headnote 9 preceding the decision in the case of *Daly v. Pederson*, (D.C. Minn. 1967), 278 F.Supp. 88 reads:

"Civil Rights Act is to be read in the context of tort liability." 42 U.S.C.A. Section 1981-1986."

And on page 94 of this opinion, the court states this with authority for the truism:

"... it is true that the Civil Rights Act is to be read in the context of tort liability, see *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961) ..."

Our 6th Circuit Court of Appeals in the case of *Corbean v. Xenia City Board of Education*, (C.A. Ohio 1966), 366 F.2d 480, cert. den. 87 S.Ct. 776, 385 U.S. 1041, 17 L.Ed. 2d 685 recently followed a long line of precedents stating the rule:

"We follow Ohio law in this tort action unless such Ohio law offends federal law or the United States Constitution *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Williams v. Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 3981 (1945); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1949)."

The *Corbean* case's jurisdiction in federal court was based upon Title 28, 1343 U.S.C.A. as is plaintiff's first cause of action. Plaintiff's second cause of action herein based on diversity jurisdiction would similarly apply Ohio's substantive law. (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Hence, because Section 2923.55 of the Ohio Revised Code is part of this states substantive tort law, under the *Corbean* doctrine, this federal court must apply this Ohio immunity statute

in this situation thereby insulating Adjutant General Del Corso and Brigadier General Canterbury from suit.

For this reason and because Ohio is itself the real party in interest in this lawsuit and is protected by the Eleventh Amendment of the United States Constitution, it is respectfully submitted this motion to dismiss be sustained.

2. Defendants Adjutant General Del Corso and Brigadier General Canterbury move to dismiss plaintiff's second cause of action found in the amended complaint for the further reason that this second cause of action fails to state a claim upon which relief can be granted. This motion is made pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure.

This court's jurisdiction over plaintiff's second cause of action is based upon the parties' diversity of citizenship (Title 28, U.S.C.A. Section 1332). It is well established that federal courts exercising diversity jurisdiction follow the substantive law of the forum state. (Title 28, U.S.C.A. Section 1652; *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

Section 5923.37 of the Ohio Revised Code provides immunity for defendants Del Corso and Canterbury in the situation at bar except in cases of willful or wanton misconduct. This statute, part of this forum state's substantive law, provides:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

There is no question but that defendants Del Corso and Canterbury were ordered to duty by the Governor of this state by authority of his position as commander-in-chief of the Ohio National Guard. (Supplemental Executive Proclamation of 5 May, 1970; Exhibit 3 attached hereto). Further, there is no allegation in plaintiff's second cause of action that defendants Del Corso and Canterbury acted with the willful or wanton misconduct necessary to negate their statutory immunity which this court must respect.

Although plaintiff's second cause of action does incorporate by reference the allegations of the first cause of action, plaintiff continues in Sections a, b and c of paragraph 3 to specifically allege only that defendants failed to exercise "ordinary care". If the plaintiff's second cause of action is interpreted as having incorporated the allegation of willful misconduct found in the first cause of action, the second cause of action must be said to be self-contradicting.

That such a contradiction would be the reality of plaintiff's second cause of action if the willful misconduct allegations of the first cause of action is read into the second cause of action is shown by the case of *Anderson v. Commissioner of Internal Revenue*, (C.C.A. 10 1936) 81 F.2d 457 at page 460. It is there written:

"This finding of negligence negatives the contention that the damage was occasioned by the willful . . . act of Anderson. Negligence and willfulness are mutually exclusive terms. . . . 'Negligence and willfulness are the opposites of each other. They indicate radically different mental states.' *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.* (C.C.A. 9) 133 F 636.

Although it is true that under the Federal Rules of Civil Procedure plaintiff may set up inconsistent separate claims, each claim itself must contain consistent allegations. The case of *Steiner v. Twentieth Century-Fox Film Corporation* (S.D. Calif. 1953) 140 F.Supp. 906 affirms this rule of pleading in headnote 3 where it is stated:

"Inconsistent allegations can be made in separate claims or defenses but not in the same cause of action. Fed. Rules Civ. Proc. Rule 8(a)(2), 28 U.S.C.A."

Because Rule 8(f) of the Federal Rules of Civil Procedure demands that all pleadings be "construed to do substantial justice" paragraph 1 of plaintiff's second cause of action must be interpreted as not incorporating the inconsistent allegation of willful misconduct on the part of defendants Del Corso and Canterbury. To interpret this incorporation paragraph of plaintiff's second cause of action differently would result in the inconsistent and mutually exclusive allegations of ordinary negligence and willful misconduct in the same cause of action. Since such allegations are mutually exclusive, each would negate the other causing the second cause of action to fail absolutely. Therefore, interpreting plaintiff's second cause of action so as to accomplish substantial justice, this claim must be said to allege only ordinary negligence against defendants Del Corso and Canterbury.

For the above reason, it is now submitted that plaintiff's second cause of action is a claim upon which relief cannot be granted and that defendants' motion to dismiss should be sustained.

IN THE ALTERNATIVE, MOTION FOR CHANGE
OF VENUE.

3. The third part of this memorandum is in support of defendants' alternative motion for a change of venue. The case at bar is an action brought by a resident of Pennsylvania against three officials of the State of Ohio in a judicial district where, at most, only part of plaintiff's claim arose. The claim is not made against those who acted on the Kent State campus by "pulling the triggers". Rather, the claim here is brought against the state officials who acted to create the situation from which the shooting occurred. The decisions and orders of the state officials providing the substance of plaintiff's claim arose in Columbus, Ohio. (Exhibit 1, paragraphs 3 and 4; Exhibit 2, paragraphs 4 and 5, attached hereto). It is, therefore, the Southern District Court of Ohio which has the compelling contact with the claim's genesis and must be considered for purposes of change in venue the judicial district where the claim arose.

Because a plaintiff's choice of forum is not an absolute and uncontrolled privilege (*Wright v. American Flyer's Airline Corp.*, (D.C.S.C. 1967), 263 F. Supp. 865), the plaintiff's selection is in no way determinative and is of little value when the selected forum is not the district in which plaintiff or defendant resides and when plaintiff's alleged claim arose in greatest part in another judicial district. (*Glenn v. Trans World Airlines, Inc.*, (D.C.N.Y. 1962) 210 F. Supp., 31.) The only contact of this lawsuit to the Northern District Court of Ohio is that the result of defendant's actions manifested themselves there.

Further, all of the defendants in this lawsuit are state officials and have duties to the State of Ohio which neces-

sarily demand their presence in the capital. (Exhibit 1, paragraphs 5 and 6; Exhibit 2, paragraphs 6 and 7 attached hereto). Because the convenience of state officials as witnesses is to be given a higher priority than the convenience of expert witnesses in determining the propriety of a motion for change of venue (*Glickenhau v. Lytton Financial Corp.* (D.C. Del. 1962), 205 F. Supp. 102), it must certainly follow that when parties are state officials and their presence is sure to be necessary for many days (as compared to a witness who testifies and leaves) the convenience and efficacy of their public duties must be respected.

It is important to note that the State of Ohio demands that suits brought against state officials be brought in the county of the capital; the theory being that such causes of action arise at the capital notwithstanding the ultimate injury results in another county. The purpose is, of course, to permit state officials to remain in the capital where they can most efficiently perform their duties to the state. Section 2307.35 of the Ohio Revised Code demands:

"Actions for the following causes must be brought in the county where the cause of action or part thereof arose:

(B) Against a public officer, for an act done by him in virtue or under color of his office, or for neglect of his official duty."

The Ohio Supreme Court case of *Meeker v. Scudder*, 108 O.S. 423, 1 O.L.A. 867, 140 N.E. 627 interpreted G.C.; 11271 (now Section 2307.35, O.R.C. *supra*) stating in headnote 4:

"Under Section 11271, General Code, actions against . . . public officers having their official places of business in Franklin County, and in no other county, can be instituted only in Franklin County."

Therefore, even though federal venue provisions are controlling of this matter, since under the federal venue provisions this cause of action is properly brought in either the northern or southern districts of Ohio, the policy of the state should control this motion for a change in venue which rests in the discretionary powers of this court.

Another compelling factor for transferring this lawsuit to the southern district court is that the vast majority of records which will be very relevant to this lawsuit are located in Columbus. (Exhibit 1, paragraph 7; Exhibit 2, paragraph 8, attached hereto). There is no doubt but that these records are more conveniently located to the southern district court than they are to the district court sitting in Cleveland, Ohio.

When all relevant factors are considered, we find that the only element favoring the litigation of this suit in the northern district court is that the results of plaintiff's claim were realized within this court's boundaries. When this single element is balanced against the situs of defendants' alleged wrongful actions, the convenience of state officials in efficiently performing their public duties, and the availability of relevant public records to the respective forums, the balancing determination is clear. A motion for change of venue should be sustained.

Respectfully submitted,

**CRABBE, NEWLON, POTTS, SCHMIDT,
BROWN & JONES**

42 East Gay Street

Columbus, Ohio 43215

Telephone: 228-5511

By /s/ CHARLES E. BROWN

Trial Attorney

(Certificate of Service omitted in printing)

EXHIBIT 1**AFFIDAVIT OF SYLVESTER DEL CORSO**

**STATE OF OHIO,
COUNTY OF FRANKLIN, ss:**

Adjutant General Sylvester Del Corso, being duly sworn, deposes and says:

1. I am one of the three named defendants in the above captioned lawsuit.

2. I am a resident of Franklin County, Ohio.

3. All of the orders and decisions made by me in connection with sending the Ohio National Guard onto the Kent State Campus were made in the city of Columbus, Ohio, located in the Southern District Court of Ohio's jurisdiction.

4. At the time plaintiff's alleged cause of action arose, I was in Columbus, Ohio, and not on the Kent State Campus.

5. My obligations and duties to the State of Ohio as Adjutant General of the Ohio National Guard demand my constant presence in this State's capital where I maintain my office and perform my daily duties.

6. If I were to be kept away from my office in Columbus, Ohio, for any period of time, it would be impossible for me to adequately perform my duties on behalf of the State of Ohio as its Adjutant General.

7. It appears from the Amended Complaint that a great many records, files, and papers of the Ohio National Guard are relevant and necessary to the final adjudica-

tion of this lawsuit. All of these records, files, and papers are located in Columbus, Ohio.

/s/ SYLVESTER DEL CORSO

Adjutant General Sylvester
Del Corso

(Jurat omitted in printing)

EXHIBIT 2

AFFIDAVIT OF ROBERT CANTERBURY

STATE OF OHIO

COUNTY OF FRANKLIN, SS:

Brigadier General Robert Canterbury, being duly sworn, deposes and says:

1. I am one of the three named defendants in the above captioned lawsuit.

2. I am a resident of Franklin County, Ohio.

3. I am also Assistant Adjutant General of the Ohio National Guard.

4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause.

5. The decisions to move the Ohio National Guard troops onto the Kent State Campus were made in Columbus, Ohio.

6. My obligations and duties to the State of Ohio as Assistant Adjutant General of the Ohio National Guard demand my constant presence in this State's capital where I maintain my office and perform my daily duties.

7. If I were to be kept away from my office in Columbus, Ohio, for any period of time, it would be impossible for me to adequately perform my duties on behalf of the State of Ohio as Assistant Adjutant General of the Ohio National Guard.

8. It appears from the Amended Complaint that a great many records, files, and papers of the Ohio National Guard are relevant and necessary to the final adjudication of this lawsuit. All of these records, files and papers are located in Columbus, Ohio.

/s/ ROBERT H. CANTERBURY

Assistant Adjutant General
And Brigadier General
Robert Canterbury

(Jurat omitted in printing)

EXHIBIT 3

State of Ohio
EXECUTIVE DEPARTMENT
Office of the Governor
Columbus

PROCLAMATION

WHEREAS, in northeastern Ohio, particularly in the counties of Cuyahoga, Mahoning, Summit and Lorain, and in other parts of Ohio, in particular Richland, Butler and Hamilton Counties, there exist unlawful assemblies and roving bodies of men acting with intent to commit felony and to do violence to person or property in disregard of the laws of the State of Ohio and the United States of America; and

WHEREAS, said unlawful assemblies and bodies of men have by acts of intimidation and threats of violence put law-abiding citizens in fear of pursuing their normal vocations in the transportation industry; and

WHEREAS, local government officials, including sheriffs and their deputies and municipal police departments, are unable with their own forces to bring about a cessation of violence and reduce the believability of threats of violence; and

WHEREAS, troops of the Ohio National Guard, in coordination with the Ohio State Highway Patrol and local peace officers, can bring about a restoration of confidence in the ability of citizens to move freely in the conduct of their business over the streets and highways of the State; and

WHEREAS, the Mayors of many Ohio cities, after taking counsel with each other, have urgently requested that the Governor make available the troops of the Ohio National Guard to assist in maintaining order and in restoring freedom of transportation movement,

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General, and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent necessary to determine the objects to be accomplished, leaving the procedure of execution to

the discretion of the commanding military officer designated by the Adjutant General.

The Adjutant General shall provide all transportation, services, and supplies necessary for the militia; and all statutory provisions requiring advertisement for bids in relation to their procurement are hereby suspended.

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in a time of public danger.

This proclamation shall continue in force until revoked.

(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 29th day of April, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:

Ted W. Brown
Secretary of State

EXHIBIT 4

**State of Ohio
EXECUTIVE DEPARTMENT
Office of the Governor
Columbus**

PROCLAMATION

WHEREAS, on April 29, 1970, the Governor of Ohio as commander-in-chief issued verbal orders to the Adjutant General of Ohio directing him to call-up such units of the Ohio National Guard as in his judgment might be necessary or desirable to meet disorders and threatened disorders relating to wildcat strikes in the truck transportation industry, and to meet disorders or threatened disorders on campuses of Ohio State University in Franklin County, and campuses of other state-assisted universities; and

WHEREAS, pursuant to Section 5923.231 of the Ohio Revised Code, the Governor of Ohio thereafter on April 29, 1970 issued his Proclamation ordering into active service such personnel and units of the militia as the Adjutant General might designate "to maintain peace and order and to protect life and property throughout the State of Ohio;" and

WHEREAS, pursuant to the verbal orders aforementioned, the Adjutant General of Ohio called to active service units of the Ohio National Guard and assigned them variously to service in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County. In addition to divers specific assignments related to restoration of order in the truck transportation industry; and

WHEREAS, it is desirable to make a written record, both events and the derivation of authority exercised by personnel and units of the Ohio National Guard in Portage County and Franklin County.

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby supplement my Proclamation of April 29, 1970, by specifying that personnel and units of the militia as may or may have been designated by the Adjutant General to maintain peace and order in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County, are included in the call to active service hereinbefore referred to; and said Adjutant General and through him the commanding officer of any organization of said militia is and was ordered to take action necessary for the restoration of order in the city and on the campuses aforesaid. The military forces involved are and were ordered to act in aid of the civil authorities, and the Adjutant General was directed to consult with them to the extent necessary to determine the object to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The active military duty herein further delineated is again designated as service in time of public danger.

This Proclamation shall continue in force until revoked with my Proclamation of April 29, 1970.

(SEAL OF OHIO)

IN WITNESS WHEREOF, I have
hereunto subscribed my name
and caused the Great Seal of the
State of Ohio to be affixed at

Columbus, this 5th day of May,
in the year of our Lord, one
thousand nine hundred and
seventy.

/S/ James A. Rhodes
Governor

ATTEST:

Ted W. Brown
Secretary of State

MOTION TO DISMISS IN KRAUSE CASE

(Filed August 17, 1970)

Civil Action No. C-70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISMISS

1. Now comes defendant James Rhodes, Governor of the State of Ohio, and, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure respectfully moves this Court for an order dismissing both causes of action in the Amended Complaint herein for the reason that the Court lacks jurisdiction of the subject matter.

2. Defendant James Rhodes, Governor of the State of Ohio, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, further hereby moves this Court for an order dismissing plaintiff's second cause of action in

the Amended Complaint herein filed for the reason that said second cause of action fails to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ R. BROOKE ALLOWAY

Attorney for Defendant James
Rhodes, Governor of the
State of Ohio,

17 South High Street
Columbus, Ohio.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

3. At the outset, it is apparent that defendant Rhodes is sued in his capacity as Governor of the State of Ohio, and in that capacity, he is clothed with the immunity of the sovereign, the action being essentially against the State of Ohio, which has not in any manner consented to be sued by waiving its constitutional right to sovereign immunity. Under Article III, Section 10, Constitution of Ohio, the Governor of the State of Ohio is the Commander-In-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States. National Guard units are correlated and recognized under Title 32, Section 101, et seq., United States Code. The composition and organization of the Ohio National Guard is governed under the provisions of Chapter 5919, Revised Code of Ohio. In the case of *Klaussen vs. Purcell*, 18 Ohio nisi prius (new series) 91, 27 O.D. 42, it has been held that the National Guard, which is the modern designation of the organized, equipped and disciplined portion of the militia, is recog-

nized by the Federal and State constitutions and statutes as a necessary arm of the government, and is a constitutional force.

4. It is clear from the allegations of the Amended Complaint that no claim is made that defendant Governor James Rhodes, himself, directly and proximately caused the death of plaintiff's decedent. It is further clear that, if defendant Rhodes has any culpability at all, it must be on the basis of his single act in calling the Ohio National Guard to maintain order on the campus of Kent State University on and about May 4, 1970. The duty of the Governor with respect to the National Guard, which is a part of the organized militia of the State of Ohio (Section 5923.01, Revised Code) is expressed in Section 5923.21, as follows:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

and further, in Section 5923.22, which reads as follows:

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

"No officer or enlisted man in the organized militia, shall refuse to appear at the time and place des-

ignated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

5. Thus, it is seen that any act of defendant Rhodes mentioned in the Amended Complaint of plaintiff, either directly or by inference, was in pursuance of his powers and duties under the Constitution and statutes of the State of Ohio, and therefore the act of the State of Ohio itself. With respect to actions against states, it is provided in the Eleventh Amendment to the Constitution of the United States, as follows:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

6. Thus, it is seen that Section 1983 of Title 42, United States Code, cannot be construed to confer jurisdiction on this Court to entertain a suit by this plaintiff against the State of Ohio in its sovereign capacity. Furthermore, it has been held under the Civil Rights Act, Section 1982 of Title 42, U.S. Code, that civil rights statutes do not afford a basis for civil actions against public officers acting in their official capacities in good faith and in pursuance of Federal or State statutes. See *Fowler vs. United States* (C.D. Cal. 1966) 258 Fed. Supp. 638.

7. It should be noted that nowhere in the Amended Complaint is there any allegation that defendant Rhodes did not act in good faith. And in no decisions under the Civil Rights Act has recovery been allowed against a public officer, acting under Federal or State statutes, where bad faith was not alleged and proved. Thus, in *Gregoire vs. Biddle*, 177 Fed. 2d 579, Cert. denied, 339 U.S. 949, 94

L. Ed. 1363, Judge Learned Hand analyzed the effect of sovereign immunity on the acts of public officers as follows:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books." 177 F. 2d at 581.

8. Further, the doctrine so announced was expressly approved by the Supreme Court of the United States in the case of *Barr vs. Matteo*, 360 U.S. 564, 571-72, (1959). Indeed, in *Barr*, the Supreme Court even indicated that allegations of malice are not sufficient to prevent the application of executive immunity. In the instant case the allegations fall far short of establishing any basis for the abrogation of executive immunity.

9. While it is not alleged that sovereign immunity has been waived by the State of Ohio, it is, perhaps, appropriate to point out that such immunity has not been waived. Section 16, Article I, Constitution of Ohio provides:

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

10. This provision has been held repeatedly not to be self-executing and to require specific authority in specific situations. See *Raudabaugh vs. State*, 96 Ohio St. 513 (1917). In the same opinion, the Supreme Court of Ohio cited the case of *Palmer vs. State of Ohio*, which was subsequently affirmed by the Supreme Court of the United States in *Palmer vs. Ohio*, 248 U.S. 32, 64 L. Ed. 108 (1918).

11. The public policy requiring the rule herein urged is clear. Government can function only by uninhibited, fearless and honest exercise of the best judgment of its executives and administrators. If a Governor is to be subjected to civil liability for the far-flung and unpredictable consequences of his act in moving to avoid or suppress riotous conduct, the effect on government can only be chaotic.

12. Defendant Rhodes further moves to dismiss the second cause of action of plaintiff stated in the Amended

Complaint for the reason that this second cause of action fails to state a claim upon which relief can be granted.

13. Irrespective of the position of defendant Rhodes in the instant case as covered by sovereign immunity, the second cause of action fails to state a ground for relief, by reason of the fact that there is, in actuality, no allegation with respect to defendant Governor Rhodes that he did other than what he was authorized to do under the statutes of the State of Ohio, implementing his constitutional power as commander in chief of the State militia. Further, it is clear from the allegations of the Complaint that defendant Governor Rhodes in no way had any direct contact with the implementation of the instrument which caused the death of plaintiff's decedent; therefore, if he were to have liability at all, it must be on the basis of the doctrine of respondeat superior. Again, there is no allegation of any act in bad faith on the part of anyone. In these circumstances, it is pertinent to give regard to the provisions of Section 5923.37 of the Revised Code of Ohio, which provides immunity for members of the organized militia under the following circumstances:

"When a member of the organized militia is ordered to do duty by State authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of wilful or wanton misconduct."

14. In the circumstances alleged in this action, it is inconceivable that this defendant can be held culpable for an act from which the actors themselves are held exonerated.

15. It is, therefore, respectfully submitted that the within motion should be sustained in its entirety, and the complaint of plaintiff as against defendant Governor James Rhodes should be dismissed and he be permitted to go hence with his costs.

/s/ R. BROOKE ALLOWAY

Attorney for Defendant Governor James Rhodes

(Certificate of service omitted in printing)

MEMORANDUM OF PLAINTIFF IN KRAUSE CASE

(Filed January 18, 1971)

Civil Action No. C70,544

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

(Title omitted in printing)

**MEMORANDUM OF LAW ON BEHALF OF PLAINTIFF
IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS**

INTRODUCTION

The subject matter of this action arises out of one of the gravest tragedies in American history. Never before has this nation witnessed such a gruesome bloodletting on a college campus. Never before have members and officers of a state militia fired upon unarmed student civilians, wantonly inflicting death and injury without just

cause. It has always been the genius of our democratic system to provide a remedy for injustice. Each branch of government compliments the other, and provides adjustments for deficiencies. There are times when the effective remedy is a judicial one, or at least an effective part of the total remedy. This case calls upon the Federal Judiciary to exercise its historic function of providing a place where issues involving the most basic rights of our people can be aired. To be sure, there have been a number of investigations into what has become known as the "Kent State Massacre". Those investigations have raised disturbing problems, but they have not provided the families of these dead children the opportunity to obtain community judgment. Indeed, these families have had no real opportunity to present evidence and focus upon the viewpoint that those responsible for the death of their beloved ones shall answer and be held accountable for their actions. It is essential to note that plaintiff Arthur Krause has not brought suit against a single triggerman, not because the triggermen are blameless, but because accountability is initially critical at the highest levels of government authority, and it would seem fitting that the message of this lawsuit be perfectly clear in that regard.

Defendants are charged in the Amended Complaint with intentionally violating the constitutional rights of Allison Krause. They are charged with sending troops onto the Kent State Campus without any cause whatsoever, knowing that their presence would almost certainly and inevitably lead to injury and death. Plaintiff does not contend that this tragic killing was the result of an inadvertent or neglectful error, misjudgment or mistake. It was not the result of some kind of unwise exercise of discretion. Plaintiff is not alleging that these defendants were mistaken about the necessity of troops, or about

the dangers these troops created; such fallibility is part of the human condition, and certainly is not the subject of this kind of litigation.

Rather—and this is the crux of it—plaintiff alleges that these actions were taken by these three men—James Rhodes, Sylvester Del Corso and Robert Canterbury—with the full knowledge that there was no legitimate cause for sending these troops, with the knowledge that the presence of these troops created an imminent risk of death on the campus, and with the specific intent of wantonly violating the rights of every unarmed student on that campus.

Plaintiff asks this court: How can it ever be within any official's lawful discretion or jurisdiction to formulate and effectuate such a culpable course of misconduct?

The purpose of defendants' motion is not to deny the truth of these allegations, but rather to urge that even if they can be proven to be the truth, the plaintiff is not entitled to any relief under the law of this land.

All plaintiff Arthur Krause asks is the right to a hearing in this courthouse to establish what he has alleged before a jury. He seeks redress for alleged violence through the legal process in the best American tradition. If no redress is possible in a courtroom, what can be said in opposition to those who would seek it in the streets. It is the practical need to encourage and provide redress in court which underlies the Civil Rights Act, to provide a peaceful channel for the airing and resolution of our conflicts, no matter how fundamental they may be. Indeed, it is this kind of case—one which addresses itself to fundamentals—which the Civil Rights Act is designed to cover. This Brief is devoted to reviewing the many authorities which confirm that notion.

THIS ACTION IS AGAINST THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES, AND IS, THEREFORE, NOT A SUIT AGAINST THE STATE OF OHIO

Defendants contend that the suits against them are in reality suits against the State of Ohio and, therefore, the doctrine of sovereign immunity should bar this action against them under the Civil Rights Act. Such a contention is wholly inconsistent with U.S.C. Title 42, §1983, which by its literal terms is specifically designed to create a cause of action against persons acting under color of state law for violating the federal constitutional rights of citizens. The language of the Civil Rights Act, itself, refutes defendants' contention. Certainly, Congress intended and understood that various state officers, agents and officials would fall within the ambit of persons acting under color of state law. It would hardly seem likely that Congress would pass a piece of legislation to protect citizens against violations by state officials of their federal constitutional rights, only to have that legislation effectively nullified by state sovereign immunity. It would seem anomalous to allow state officials through the doctrine of sovereign immunity to immunize themselves against a federal statute designed to protect federal rights.

It is of no assistance to defendants to inject their own characterization that they have been sued "in their representative capacities". They are sued herein as "persons" who violated plaintiff's federal constitutional rights while acting "under color" of the state law within the clear meaning of the Civil Rights Act.

Contrary to defendants' contention, the Eleventh Amendment to the United States Constitution has no application whatsoever because this is not a suit "against

one of the United States". It should be noted that such a suit was, in fact, filed in the Cuyahoga County Common Pleas Court (Case No. 884042), and in that suit, the State of Ohio properly raised the available defense of sovereign immunity. That case is now on appeal in an effort by this plaintiff to persuade the Ohio courts of the unfairness of the sovereign immunity doctrine.

Defendants cite *Fowler v. U. S.*, 258 F. Supp. 638 (1966) in support of their contention that this is an action against the state and is, therefore, barred by state sovereign immunity. *Fowler, supra*, does not stand for any such proposition. The gravamen of the case was that the plaintiff (State Chairman of the Ku Klux Klan) had failed to show a sufficiently definite and complete occurrence to constitute a violation of civil rights. The court emphasized that a mere threat or intent to violate plaintiff's civil rights did not constitute sufficient grounds for injunctive relief against the state or federal officials. Obviously, in the present case, we are hardly dealing with an incompleated threat or an uneffectuated intention. We are here dealing with the tragic finality of death, allegedly the result of specific unlawful actions taken by these defendants.

More critically, *Fowler, supra*, specifically holds that public officials who act in their official capacities in bad faith are amenable to suit under the Civil Rights Act. One need only quote from page 4 of defendant's brief:

"Civil Rights Statutes do not afford any basis for civil actions. . . . against public officials acting in their official capacities in good faith and in pursuance of Federal or State Law 42 U.S.C.A. Sections 1981-1985, 1988". (Emphasis added).

Fowler, supra, cites the cases of *Hewitt v. City of Jacksonville*, 188 F2d 423 (C.A. 5th 1951), cert. den., 342

U.S. 835, 72 S.Ct. 58, 96 L.Ed. 631 (1951); *Sires v. Cole*, 320 F.2d 877 (C.A. 9th 1963); *Larson v. Domestic and Foreign Commerce Corp.* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1948); *Malone v. Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, 8 L.Ed. 2d 168 (1962), and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963). None of these cases involve allegations of intentional misconduct and bad faith, such as in this case now before the court. In fact, in *Larson*, *supra*, the United States Supreme Court specifically delineates the area of amenability to suit of state officials at pages 701-702:

"The action of an official of the sovereign (be it holding, taking or otherwise affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the official as an individual only if it is not within the official's statutory powers, or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." (emphasis added)

The *Larson* holding *supra*, above-quoted, is specifically reaffirmed by the United States Supreme Court in *Dugan* and *Malone*, *supra*. Defendants additionally cite *Kenny v. Killian*, (W.D. Mich. 1955), 133 F.Supp. 571, which specifically notes that any immunity to be applicable, requires that those officials acting in their official capacities in good faith (see quotation at page 5 in defendants' brief). Nor does *Ford Motor Company v. Treasury Department*, 323 U.S. 459, 89 L.Ed 389, 65 S.Ct. 347 (1944) cited by defendants, control the facts of the present case. There it was held that a suit against individuals constituting the Board of the Department of the Treasury, was a suit against the state because "where a suit is in essence one for the recovery of money from the state, the state is the real party in interest." Since the

present case is against these defendants, individually, and would not be collectible against the State of Ohio, *Ford Motor Company, supra*, is inapplicable. Such has been precisely held in Ohio in the case of *Paramount Film Distributing Corp. v. Tracy*, 176 N.E. 2d 610 (1960).

The case of *Dunn v. Estes*, (D.C. Mass. 1953) 117 F. Supp. 146, cited by defendants, does not apply to this case. Plaintiff's allegations go far beyond the kind of "mistake of fact" or "erroneous construction and application of the law" of which *Dunn*, speaks, *supra*. Moreover, defendants certainly have misapplied *Maryland, et al. v. United States*, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed. 205 (1965), which has nothing whatsoever to do with the Civil Rights Act, or, for that matter, with sovereign immunity. In *Maryland, supra* plaintiff was contending that a National Guardsman was acting as a federal employee; however, the court held that he was acting as a state employee, thereby barring plaintiff's claim for negligence under the Federal Tort Claims Act. Clearly, the mere fact that a guardsman is acting in some sense as a "state employee", does not in and of itself totally exempt that guardsman from liability under U.S.C. Title 42, Section 1983.

Defendants have completely failed to cite, much less distinguish, numerous authorities (including several of the United States Supreme Court), pointedly refuting defendants' argument that this suit is in reality against the State of Ohio and is barred by the Eleventh Amendment or any other immunity.

One of the leading decisions of the United States Supreme Court is *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed. 492 (1960). In that important decision, the plaintiff alleged a violation of his Fourteenth Amendment rights under the Civil Rights Act by municipal police officers, who allegedly, after arresting plaintiff failed to take him to a magistrate,

to allow him to call his family, to make any specific charges against him, or to obtain a required search or arrest warrant. Defendants (13 individual police officers) contended that since Illinois provided redress for this kind of alleged misconduct, the Civil Rights Act did not apply. Mr. Justice Douglas, for the majority, specifically held that the Civil Rights Act was a supplementary remedy to any available state remedies. As Mr. Justice Douglas stated at page 498:

"The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice". (emphasis added)

In *Egan v. City of Aurora*, 365 U.S. 514 (1960), the United States Supreme Court specifically removed immunity from liability under §1983 for City Commissioners, council for the city, police chief, sheriff, Justice of the Peace, state's attorney, and others, for arresting the Mayor of Aurora during a meeting which defendants alleged had possibilities of turning into a riot.

With respect to the argument of defendants that the Eleventh Amendment bars this suit, defendants failed to cite the landmark decision by the United States Supreme Court, *Ex Parte Young*, 209 U.S. 123 (1908), a suit against the Attorney General of Minnesota to enjoin enforcement of an unconstitutional state statute. The Supreme Court rejected the argument that the suit was in reality one by a citizen against a state, thereby barred by the Eleventh Amendment. The court specifically held that "the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States . . . he is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Similarly, in the case of *Georgia Railroad & Banking Co. v. Redwine*, State Reve-

nue Commissioner, 342 U.S. 299 (1952), a citizen challenged the unconstitutionality of collecting taxes that impaired the obligation of contract. In refusing immunity under the Eleventh Amendment, the United States Supreme Court held that "a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state". Numerous authorities have followed these critical Supreme Court decisions regarding the Eleventh Amendment and state sovereign immunity as a defense under the Civil Rights Act.

In *Chapman v. California*, 17 L.Ed. 2d 705 (1967), the United States Supreme Court alluded to the essence of its previously adopted positions in *Ex Parte Young*, *Georgia Railroad & Banking Co.*, *Monroe*, and *Egan*, *supra*, in holding that the federal standard of harmless error was applicable where federal constitutional rights are at stake, at page 709:

"With faithfulness to the constitutional union of the states, we cannot leave to the states the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by states of federally guaranteed rights."

See also, the case of *Johnson v. Crumlish*, 224 F. Supp. 22 (D.C. Penn. 1963), where the court permitted suit under §1983 against the District Attorney of Philadelphia, Clerk of Quarter Sessions Court, and others, for having imprisoned the plaintiff under an illegal bench warrant.

Other authorities have held that state immunity should not apply in actions against public officials for violations of federally protected rights. See *American Federation of State, County and Municipal Employees, AFL-CIO v. Woodward*, 406 F. 2d 137 (8th Cir. 1969); *Westberry v. Fisher*, 309 F. Supp. 12 (S.D. Maine 1970); *Birnbaum v. Trussell*, 347 F. 2d 86 (2d Cir. 1965); and *Jobson*

v. Henne, 355 F. 2d 129 (2d Cir. 1966). In *Birnbaum, supra*, a physician brought an action under §1983 against the Commissioners of the City Department of Hospitals, for dismissal based on race; the Circuit Court pointed out that a showing that the defendants acted within the scope of their employment is not sufficient to defeat the court's jurisdiction. The court reasoned at pages 88-89, as follows:

"It would nullify the whole purpose of the Civil Rights Statutes to permit governmental officials to resort to the doctrine of official immunity . . . to the extent that state or municipal officers, such as the defendants Trussell and Mangum violate or conspire to violate constitutional and federal rights, the Civil Rights Laws. . . . abrogate the doctrine of official immunity". (emphasis added).

In *Jobson, supra*, the Circuit Court held as follows at page 133:

"To hold that all state officials in suits brought under §1983 enjoy an immunity similar to that they might enjoy in suits brought under state law would practically constitute a judicial repeal of the Civil Rights Act . . . the purpose of §1983, as well as the other Civil Rights provisions, is to provide a federal remedy for deprivation of federally guaranteed rights . . . to hold state officials immune from suit would very greatly frustrate the salutary purpose of this provision".

Jobson, supra, was a suit by an inmate of a mental institution against the officers and supervising psychiatrists at that institution. The court went on to reason that "the language and purpose of the Civil Rights Acts are inconsistent with the application of common law notions of of-

official immunity." Since §1983 says that acts of persons liable must be under color of law, "this test can rarely be satisfied in the case of anyone other than a state official".

See also, the case of *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D., N.Y. 1969), where the court held at page 123:

"We fail to perceive what interest would be served by holding Federal Courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are".

In *Westberry, supra*, the court reasoned as follows at page 15:

"... Section 1983 is cast in terms so broad as to indicate that governmental immunity can never be a defense in suits brought under that section". (emphasis added)

Peterson v. Stanczak, 48 F.R.D. 400 (N.D., Ill. E.D. 1969), held that governmental immunity is not available to policemen, sheriffs, coroners, and even in some situations, Judges.

In *Beauregard v. Wingard*, 230 F. Supp. 167 (S.D. Cal. S.D. 1964), the court held at page 173, as follows:

"... it is a familiar doctrine that such a statute [42 U.S.C. §1983] may not be set at naught where its benefits denied by State Statutes, State Common Law Rules or State Decisional Law".

In *James v. Ogilvie*, 310 F. Supp. 661 (N.D., Ill. E.D. 1970), the court held at page 633, as follows:

"Nor are these defendants immune from suit. Defendants suggest that in the absence of any allegations that they were acting other than in their official capacity as state officials, they are immune from this Civil Rights action. This argument has no merit. It is precisely because defendants committed the alleged conduct in their official capacities, that is, under color of law, that they are subject to Civil Rights suits. 42 U.S.C. 1983."

In *Cohen v. Norris*, 300 F. 2d 24 (9th Cir. 1962), the court held at page 33:

"... no logical rule of immunity unassociated with a generally recognized common law immunity can stand as a defense in a Civil Rights Act case".

See also, *Smith v. Cremins*, 308 F. 2d 188 (1962), another 9th Circuit decision following *Cohen*, *supra*.

Perhaps it would do well to call upon the older authority of the United States Supreme Court in *Ex Parte Virginia*, 100 U.S. 339 (1897), a decision rendered by the United States Supreme Court after the passage of the Civil Rights Act. In that case, the United States Supreme Court held that a Judge could be criminally prosecuted under provisions of a Federal Statute, making it a crime for "any officer or other person, charged with any duty in the selection or summoning of jurors" to disqualify grand or petit jurors "on account of race, color, or previous condition of servitude." 18 Stat. part 3,336. As to the claim by this Judge of judicial immunity, the United States Supreme Court held at pages 348-349, over 70 years ago, in language which bears directly upon the exercise of official power, as follows:

"Whether the act done by him was judicial or not is to be determined by its character, and not by the

character of the agent. Whether he was a county judge or not is of no importance.

"The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy or the act of a road-master in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc.

"Is their election or appointment a judicial act?

"But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his direction. . ." (at pp. 348-9) (emphasis added)

Many cases exist in which it has been held that state officials were properly sued under §1983. *E.G., Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970) (police officers); *Hershel v. Dyr*, 365 F.2d 17 (7th Cir.), cert. denied, 385 U.S. 973 (1966) (policeman-First Amendment claim); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969) (sheriff-false imprisonment); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968) (police officer-false arrest); *Wright v. Mc-*

Mann, 387 F.2d 519 (2d Cir. 1967) (Warden of State Prison); *Sostre v. Rockerfeller*, 312 F. Supp. 863 (S.D.N.Y. 1970) (Warden and State Commissioner of Corrections); *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967) (county officials); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (Mayor); *Harkness v. Sweeney Ind. School Dist.*, 427 F.2d 319 (5th Cir. 1970) (trustees and superintendent of school district); *Delatte v. Genovese*, 273 F. Supp. 654 (E.D. La. 1967) (state coroner).

Ohio authorities understandably follow the basic trend of the United States Supreme Court in this area.

In this circuit, in the case of *Bargainer v. Michal*, 233 F. Supp. 270 (1964), plaintiff had stated a cause of action against defendants who moved to dismiss the complaint for failure to state a claim under the Civil Rights Act. Plaintiff alleged that defendant police officers physically abused plaintiff, and thereafter conspired to deprive plaintiff of his constitutional rights. In *Bargainer, supra*, the court specifically held that with respect to the activities of the officers, the Motion to Dismiss had to be denied inasmuch as the complaint did state a cause of action under §1983.

However, the court noted that the conspiracy allegations failed for lack of any allegation of a specific intent to discriminate on the part of the defendants. However, the conspiracy alleged in the instant case now before this court clearly sets forth that specific intent.

In *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio E.D. 1967), plaintiffs in a class action for declaratory relief under §1983, withstood a claim of official immunity raised by defendant Governor Rhodes in a suit to prevent the State of Ohio from entering into discriminatory contracts, stating that §1983 "is intended to allow redress against official representatives of the state who abuse their posi-

tions. It was enacted as a means for reinforcing the provisions of the Fourteenth Amendment against those who act as officials of the state, whether they act in accordance with their authority or misuse it".

Similarly, in *Steine v. Atkinson*, 690 O.App. 529, 44 N.E.2d 732, (1942), the plaintiff was a Civil Service employee, who alleged he was dismissed from office by the defendants because he was a Democrat. The defendants claimed official immunity but the court rejected this defense in holding as follows:

"Those acts dealt with matters which they were by law required to perform. It is true a public officer may be held liable in damages for torts wholly independent of his office and purely personal, but he may also be personally charged with liability for wrongs perpetrated by him in and by virtue of his office."

The court held further in supporting its position, that an official can be amenable to suit when acting in his official capacity, by relying upon former Section 11271, General Code, (now O.R.C. Section 2307.35).

See also, the case of *New American Library of World Literature v. Allen*, 114 F.Supp. 823 (N.D. Ohio E.D. 1953). The plaintiff there brought an action for an injunction and for damages against the Chief of Police for unlawful suppression of certain of plaintiff's books. The court stated as follows:

"Where public officers exceed their lawful powers, they no longer act as duly authorized agents of government. In such cases they act with no greater legal authority than private persons."

See also, *Leech v. Cook*, 48 O.App. 205, 10 Ops. 172, 192 N.E. 797 (1934).

Defendants seem to rely heavily upon *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. Ohio 1966), cert. den. 385 U.S. 1014, 87 S.Ct. 776, 17 L.Ed. 2d 685. *Corbean, supra*, was a personal injury action brought by the plaintiff against the School Board of Education for negligence. It is clearly distinguishable from the present case in that the suit seeks to impose liability upon a state agency, rather than against individuals, and in that §1963 is not the basis of jurisdiction. Moreover, the allegations would appear to involve only simple negligence and clearly the allegations in the present case go well beyond that.

It would, therefore, seem upon thorough review of the authorities, that defendants may not claim any immunity, either under the Eleventh Amendment or pursuant to any fair interpretation of case law. Certainly, sovereign immunity is not at issue here, and to assert it in this case as an immunity, is totally inconsistent with the fundamental purpose of the Civil Rights Act, both Title 42, Section 1983 and Title 42, Section 1985(3), which is also a jurisdictional basis for this action insofar as conspiracy is involved, the court not being bound by any title in the caption.

**THERE ARE NO ADDITIONAL CONSIDERATIONS
WHICH IMMUNIZE DEFENDANT JAMES RHODES
FROM AMENABILITY TO SUIT**

In addition to the various contentions raised on behalf of defendants Del Corso and Canterbury, which equally apply to defendant Rhodes, defendant Rhodes raises additional contentions which will be briefly dealt with at this point.

Defendant Rhodes contends and, indeed, provides a copy of his "Proclamations" indicating that his conduct in connection with the incident of May 4 was pursuant to powers vested in him by the Constitution and Statutes of the State of Ohio. It should be patently evident from the cases cited already, that the mere fact that defendant Rhodes was ostensibly acting in an official capacity when he intentionally violated the rights of plaintiff, creates no immunity under the Civil Rights Act. Nor do the "Proclamations" which are attached as exhibits in any way create an automatic immunity for the Governor when it is alleged in the Amended Complaint that his actions, individually and in conspiracy, were designed and intended to specifically violate the rights of plaintiff, and where it is further alleged that all of his actions were taken with the full knowledge of the imminent consequences which eventually took place. It is inconceivable that the Civil Rights Act would not apply to such alleged abuse of power, particularly where one of the requirements under the Civil Rights Act is that action taken by the state official be "under color of state law." What defendant Rhodes has demonstrated is that he acted, indeed, "under color of state law". He does not demonstrate that he is immune either by virtue of some official immunity inherent in the Civil Rights Act or by virtue of any implied sovereign immunity.

It is suggested by defendant Rhodes that there is no allegation of failure on his part to act in good faith. Surely, the allegations give rise to such a clear inference, and if this is defendant Rhodes' only objection, plaintiff is certainly prepared to add these specific words to his allegations, as it would be fully consistent with everything alleged in the Amended Complaint.

See, for example, *Parine v. Levine*, 274 F. Supp. 268 (E.D. Mich. S.D. 1967), where the court held that mere

allegations of an intentional violation of another's Civil Rights made it unnecessary to consider the defense of "good faith".

In *Service Employees International Union v. City of Butler, Pa.*, 306 F. Supp. 1080 (W.D. Penna. 1969), the court found that the concept of "good faith" can only be arrived at by a factual determination.

For the reasons indicated, defendant Rhodes is similarly subject to suit, along with the other two defendants.

THE DOCTRINE OF STATE SOVEREIGN IMMUNITY VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

Notwithstanding plaintiff's contention that sovereign immunity is completely inapplicable in this case, plaintiff also advances the position that state sovereign immunity should be considered and held constitutionally void. As a matter of Equal Protection, what rational basis can there be for imposing a discrimination with respect to the right of recovery between that class of persons who happen to be injured or killed by "official misconduct as distinguished from that class of persons who happen to be killed by "unofficial" misconduct. Such a discriminatory doctrine is invidious, arbitrary and capricious, wholly a creature of historical anomaly. Sovereign immunity, long ago abandoned in England, the country of its inception, is today in retreat in this country, and State Supreme Courts have forthrightly recognized the gross injustices it perpetuates and have, therefore, struck it down as invalid.

Justice Traynor in the leading national decision of *Muskopf v. Corning Hospital District*, 55 C. 2d 211, 11

Cal.Rptr. 89, 359 P. 2d 457 (1961), wrote at page 216 and page 221, as follows:

"If the reason for *Russell v. Men of Devon* and the rule of county or local district immunity ever had any substance they have none today. Public convenience does not outweigh individual compensation . . .

"The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia . . .

"None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative . . . and judicial . . . and the exceptions operate so illogically as to cause serious inequality..." (at page 217)

"Only the vestigial remains of such governmental immunity has survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend." (Emphasis added)

Therefore, not only is sovereign immunity inapplicable in this case, but the doctrine is in and of itself unconstitutional, as a matter of Equal Protection and as a matter of Due Process of Law.

**PLAINTIFF'S ALLEGATIONS SUFFICIENTLY SET
FORTH THE STATE OF MIND REQUIRED OF DE-
FENDANTS BY THE CIVIL RIGHTS ACT**

The Amended Complaint specifically charges all of the defendants with knowingly sending untrained troops with loaded weapons onto a college campus without any cause whatsoever, with the knowledge that there would be an imminent risk of injury and death to unarmed students, that these actions were done by all defendants, individually and in conspiracy, in complete and utter indifference and disregard for the lives of unarmed students, and that these acts were done with the specific intent of depriving plaintiff and plaintiff's decedent of their civil rights. In addition, the Amended Complaint further alleges that defendant Robert Canterbury intentionally and wilfully failed to take any action whatsoever under the circumstances, he being present with the troops on the campus at all times, and that his failure to prevent his troops from so conducting themselves was in wanton, reckless and callous disregard and indifference for the lives of unarmed civilians. The issue is whether or not these allegations sufficiently describe the state of mind required for liability under the Civil Rights Act.

It is specifically noted in *Bargainer, supra*, that there must be an intent to deprive plaintiff of a federal right. Such an intent has clearly been alleged against all defendants.

Nevertheless, a number of courts have held that an intent is not actually required. In *Monroe, supra*, the language of the United States Supreme Court is instructive:

"It is abundantly clear that one reason the Legislation was passed was to afford a federal right in Federal

Court caused by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced. . . and the immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." (Emphasis added)

In *Daniels v. Van de Venter*, (C.A. Col. 1967), 382 F.2d 29, the court quoted from *Monroe, supra*, stating that "intent is not a necessary element to be shown, but as in any tort action a defendant in an action under §1983 of the Civil Rights Act is responsible for the natural consequences of his act".

Similarly, in *Hardwick v. Hurley*, (7th Cir. 1961), 289 F.2d 529, the court held that the allegation of purpose with which an unconstitutional act is perpetrated is not a prerequisite to a suit under §1983. In accord are *Nelson v. Knox*, (6th Cir. 1958) 256 F.2d 312; *Cohen v. Norris, supra*; and *Joseph v. Prowlen*, (7th Cir. 1968) 402 F.2d 367.

In *Jenkins v. Averette*, 4th Cir., April 20, 1970, 38 L.W. 2607, the court upheld a right to recovery under the Civil Rights Act against a police officer in a shooting incident upon a showing by plaintiff of gross or culpable negligence. The Court reasoned "that if intent is required, it may be supplied for federal purposes by gross and culpable negligence just as it was supplied in the Common Law cause of action".

In *Striker v. Pancher*, (6th Cir. 1963), 317 F.2d 780, the court held that §1983 is aimed at "reprehensible action on the part of the defendant". See also *Brown v. U.S.*, 204 F.2d 247 (1953).

It would seem, therefore, that the allegations in the Amended Complaint meet the required state of mind under the Civil Rights Act; certainly these allegations give

rise to a fair inference of bad faith, but in the event that defendants are making the highly technical claim that "bad faith" has not been literally alleged, or if this court should have any question concerning the existence of an inference of "bad faith" either with respect to motive or intent, plaintiff is prepared to cure this concern with a specific allegation to that effect.

**THE STATE OF OHIO SPECIFICALLY ALLOWS A
CAUSE OF ACTION UNDER STATE LAW AGAINST
A MILITIAMAN FOR WANTON MISCONDUCT**

O.R.C. Section 5923.37 reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct." (Emphasis added)

Defendants have seemed to overlook in their Brief the unmistakable meaning of this Section. This Section does not provide for any immunity, once it is shown that there is wilful or wanton misconduct on the part of a member of the organized militia.

All three defendants are members of the organized militia. There can be no question that defendants Canterbury and Del Corso were ordered to duty by state authority, namely the Governor, and that they were members of the organized militia. As for defendant Rhodes, it would seem that he is both a civilian exercising power over the State Militia, as well as a member of the militia by virtue of his status as Commander-in-Chief.

Moreover, the acts alleged by plaintiff concerning all three defendants were definitely within the scope of their military duty.

In addition, defendant Canterbury was himself at the scene of the alleged disorder at Kent State, within the meaning of the Statute, and both defendant Rhodes and defendant Del Corso were at various times prior to the incident and at certain times alleged in the Amended Complaint on the scene, giving orders, taking actions, and making decisions, all of which resulted in the death in question.

It should be noted with respect to any actions alleged in the Amended Complaint which were not performed by any of the defendants "within the scope of their military duties" or "at the scene of any disorder within any designated area" that wanton misconduct would not be the applicable standard and the proper standard would be common law negligence. In other words, the wanton misconduct provision of O.R.C. §5923.37 is in reality a remedy for a specific circumstance and in the absence of that circumstance, the usual standard of negligence should apply.

While it would seem clear that the allegations in the Amended Complaint demonstrate wanton misconduct at the least, however, plaintiff will, nevertheless, review the authorities relevant to wanton misconduct.

In *Universal Concrete Pipe Co. v. Bassett*, 130 O.S. 567, 200 N.E. 843 (1936), the court defined wanton misconduct as follows:

"Although actions for willful or wanton conduct have often been treated under the head of negligence actions, an action based upon willful or wanton misconduct is apart from the action for negligent conduct. The difference is one of kind, not merely degree . . . wanton

misconduct is such conduct as manifests a disposition to perversity and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious of such surrounding circumstances and existing conditions that his conduct will in all common probability result in injury".

In *Tighe v. Diamond*, 149 O.S. 520, A.D. N.E. 2d 122, (1948), the court defined wanton misconduct as comprehending "an entire absence of all care of the safety of others and indifference to consequence."

In *Zalewski v. Yancy*, 101 O.App. 501, 140 N.E. 2d 592 (1956), the court held that a probability of injury known to the defendant would meet the test of wanton misconduct under the Guest Statute.

In *Kellerman v. J.S. Durig Co.*, 176 O.S. 320, 199 N.E. 2d 562 (1964), the Ohio Supreme Court carefully defined wanton misconduct as follows:

"Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was actually known, or in the circumstances ought to have been known to the defendant". (Emphasis added)

See also the case of *Gossett v. Jackson*, 100 O. App. 2d 121, 226 N.E. 2d 142 (1965); *Reserve Trucking Co. v. Fairchild*, 128 O.S. 519, 191 N.E. 745 (1934); *White v. Harvey*, 170 O.S. 262, 163 N.E. 2d 898 (1960); *Botto v. Fischesser*, 174 O.S. 322, 189 N.E. 2d 127 (1963); *Roszman v. Sammet*, 20 O. App. 2d 255, 254 N.E. 2d 51 (1969).

Defendants cite O.R.C. Section 2923.55 as a basis for claiming immunity to defendants Del Corso and Canterbury. This Section has no applicability whatsoever to this case because it involves criminal liability rather than civil liability in the first place, and in the second place, it assumes a fact not fairly raised in the pleadings—namely, that defendants were “engaged in suppressing a riot or in dispersing or apprehending rioters.” This would seem to be a question of fact for a jury to decide, based upon proper instructions as to the legal definition of a “riot” or “rioters”. Also, the Amended Complaint does not fairly raise an inference that “any order to desist and disperse had been issued.”

Finally, in an effort to avoid the application of aforementioned O.R.C. Section 5923.37, defendants are contending that the Second Cause of Action does not incorporate by reference the allegations of the First Cause of Action. This is a technical objection, even if at all valid, and should not lead this court to grant the Motion to Dismiss without allowing leave to make this minor amendment. However, it is, in fact, not true that plaintiff is unable to assert inconsistent allegations within the same cause of action.

With respect to Rule 8(e) (2), F.R.C.P., it is stated as follows in Wright and Miller, “FEDERAL PRACTICE AND PROCEDURE”, Civil, at pages 371-373 of Section 1283:

“Under Rule 8(e) (2), a party is permitted to set forth inconsistent statements either alternatively or hypothetically within a single count or defense or in separate claims or defenses. . . he also may set forth inconsistent legal theories in his pleading and will not be forced to select a single theory on which to seek recovery.

The court in *Michael v. Clark Equipment Co.*, 380 F. 2d 351, 2d Cir. 19, held at page 352:

"The plaintiff is at liberty to refuse to be pinned down to a single theory of fraud, and inconsistency is not a tenable objection to a pleading . . ." Federal Rules of Procedure 8(3) (2).

Similarly, the court held at page 178 in *Breeding v. Massey*, 378 F. 2d 171 (8th Cir. 1967) as follows:

"The right of a plaintiff to try his case on alternative theories has uniformly been upheld in the Federal Court, and plaintiff cannot be required to elect upon which theory to proceed."

If defendants' only objection is that plaintiff has not supplied separate causes of action—one cause of action for wanton misconduct and another cause of action for negligence—then plaintiff is perfectly willing to make such separate claims in separate causes of action to remedy any such formal objection which defendants are apparently making.

CONCLUSION

The legal authorities cannot convey the depth of this tragedy, nor can they convey the imperative practical necessity of an open forum in Federal Court in this case. Though in a sense all cases are important to the litigant, it is suggested that the absence of a forum in this case would be a most unfortunate thing. It is plaintiff's position that the law applicable in this case clearly provides the avenue for redress, and for all of the reasons set forth in this Memorandum of Law, plaintiff moves that this

court overrule in all respects defendants' Motion to Dismiss.

Respectfully submitted,

/s/ STEVEN A. SINDELL, of Counsel
SINDELL, SINDELL, BOURNE, MARKUS,
STERN & SPERO

1400 Leader Building
Cleveland, Ohio 44114—781-8700
Attorneys for Plaintiff.

(Certificate of service omitted in printing)

**ANSWERS TO INTERROGATORIES IN
KRAUSE CASE**

(Filed May 7, 1971)

Civil Action C70-544

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

(Title omitted in printing)

Now come the defendants and specially appear in the above captioned proceeding for the sole purpose of submitting answers to the plaintiff's interrogatories. Defendants' motions to dismiss are presently pending before the Court; this special appearance by defendants is in no way to be construed as a waiver of defendants' immunity from suit as set forth in their motions to dismiss.

**ANSWERS TO INTERROGATORIES BY
SYLVESTER DEL CORSO AND ROBERT CANTERBURY**

1. State the name, address, unit and rank of each and every member of the Ohio National Guard who was situated in the immediate area in which guns were fired at the time of the shooting described in the Amended Complaint filed in this action.

ANSWER: Refer to Exhibit 1 attached hereto.

2. State the name, address, unit and rank of each and every member of the Ohio National Guard who fired a gun of any kind at the time and place of the shooting incident described in the Amended Complaint filed in this action.

ANSWER: Defendants refuse to answer Interrogatory No. 2 based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five.

3. If for any reason you are unable to fully answer either Interrogatory Number One or Number Two state with specificity all of the reasons why you are unable to fully answer.

ANSWER: Refer to the answer to Interrogatory No. 2.

4. If for any reason you are unable to fully answer either Interrogatory Number One or Number Two, state whether or not there are any records, reports, documents, notes, transcriptions, writings, films or recordings of any kind known to you containing the answer to Interrogatories Numbers One and Two.

ANSWER: Defendants refuse to answer Interrogatory No. 4 based upon their privilege against pos-

sible self-incrimination, United States Constitution, Amendment Five.

5. If our answer to Interrogatory Number Three is in the affirmative, specify the precise nature of each and every record, report, document, note, transcription, writing, film or recording of any kind and specify the name and address of its present custodian.

ANSWER: Not applicable.

6. Are you aware of any recordings, photographs, reports, statements, transcriptions, notes, documents, films or other writings or tangible items of any kind in any way related or relevant to any of the matters set forth in the Amended Complaint?

ANSWER: Defendants refuse to answer Interrogatory No. 6 based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five.

7. If your answer to Interrogatory Number Six is in the affirmative, then for each such record, photograph, report, statement, transcription, note, document, film or other writing, or tangible item of any kind state the following:

- A. Its precise contents or nature;
- B. The name and address of its present custodian;
- C. Whether you will make such item or writing available to plaintiff or to plaintiff's attorney without the necessity of a Motion to produce.

ANSWER: Not applicable.

8. Were any members of the Ohio National Guard injured in any way immediately prior to or during the fir-

ing of weapons at the time of the shooting described in the Amended Complaint filed in this action?

ANSWER: Yes.

9. If your answer to Interrogatory No. 8 is in the affirmative, state the name, address, unit and rank of each member of the Ohio National Guard who was injured.

ANSWER: Refer to Exhibit #2.

10. For each person mentioned in your answer to Interrogatory Number Nine, state the following:

A. The cause of injury;

ANSWER: As stated in Exhibit #2.

B. The name and address or other identification of the person or persons, if any, causing the injury;

ANSWER: Rioters on the Kent State University campus, May 4, 1970.

C. The approximate time the injury was sustained:

ANSWER: Immediately before the incident described in the Amended Complaint.

D. The location of the person injured at the time such injury was sustained;

ANSWER: To the best of our knowledge, on Blanket Hill, near the Pagoda, on the Kent State University campus.

E. The specific nature of the injury;

ANSWER: As stated in Exhibit #2.

F. The nature of treatment, if any, rendered for the injury;

ANSWER: Unknown to defendants at this time.

G. The medical facility, if any, where the treatment was rendered;

ANSWER: To the best of our knowledge, treatment was given to those injured at the Kent State University Medical Center.

H. The name and address of all persons who rendered any treatment whatsoever in connection with the injury;

ANSWER: To the best of our knowledge, treatment was rendered by Gary P. Dackor, 2 Lt. MC OARNG, Medical Platoon Leader.

I. The dates on which treatment was rendered;

ANSWER: To the best of our knowledge, May 4, 1970.

J. The name and address of each and every person who witnessed either the occurrence of the injury or the presence of the injury; and

ANSWER: Unknown to the defendants at this time other than stated above.

K. The name and present address of the present custodian of any photographs evidencing such injury.

ANSWER: Unknown to the defendants at this time.

11. Do you claim that anyone other than a member of the Ohio National Guard fired a gun of any kind immediately prior to or at the time of the shooting incident described in the Amended Complaint filed in this action?

ANSWER: Yes.

12. If your answer to Interrogatory Number Eleven is in the affirmative, then state with specificity and in detail the factual basis for any and all reasons for such

claim, including the names and addresses of any and all persons who have any knowledge supporting such claim.

ANSWER: General Canterbury heard non-military weapons discharged. Others reporting non-military firing were:

Michael Curtis Anderson, 3648 North Drive, Greenville, Ohio

John A. Bambeck, 991 Medina Road, Medina, Ohio

John D. McDermott, 521 Brown Street, Akron, Ohio

Clarence Harris, 620 Hudson Avenue, Akron, Ohio

Edward C. Meyer, 4751 East Hayes, Ravenna, Ohio

Joseph F. Bertholdi, c/o Kent State University Police Force, Kent, Ohio

Lowell Powers, 25042 Mahoning Road, Deerfield, Ohio

Warren Dale Miller, address unknown

13. If your answer to Interrogatory Number Eleven is other than in the affirmative or negative, then specify with particularity why you are unable to answer in either the affirmative or negative.

ANSWER: Not applicable.

14. Do you claim that plaintiff's decedent, Allison Krause, in any manner caused any injury whatsoever to any member of the Ohio National Guard who fired a weapon immediately prior to or at the time of the shooting described in the Amended Complaint?

ANSWER: Yes.

15. If your answer to Interrogatory Number Fourteen is in the affirmative, then state with specificity and in detail the factual basis for any and all reasons for such claim, including the names and address of any and all persons who have any knowledge supporting such claim.

ANSWER: Allison Krause was unknown to the defendants so that it is unknown whether she was one of those rioters who caused injury to members of the National Guard immediately prior to the incident described in the Amended Complaint.

16. If your answer to Interrogatory Number Fourteen is other than in the affirmative or negative, then specify with particularity why you are unable to answer in either the affirmative or negative.

ANSWER: Refer to Answer to Interrogatory #15.

17. Do you claim that plaintiff's decedent, Allison Krause, in any manner caused any member of the Ohio National Guard who fired a weapon immediately prior to or at the time of the shooting described in the Amended Complaint to fear serious injury or that his life was in danger?

ANSWER: Although Allison Krause was unknown to the defendants immediately prior to the incident described in the Amended Complaint, it is known that she was among the crowd menacing, threatening, and assaulting the National Guard and causing them actual injury and grave concern for their lives.

18. If your answer to Interrogatory Number Seventeen is in the affirmative, then state with specificity and in detail the factual basis for any and all reasons for such belief, including the names and addresses of any and all persons who have any knowledge supporting such claim.

ANSWER: Defendants refuse to answer Interrogatory No. 18 in its entirety based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five. Defendants Del Corso and Canterbury base part of their knowledge on photographs they observed at the President's Commission

hearing relative to Kent State. These photographs showed Allison Krause with the rioters.

19. If your answer to Interrogatory Number Seventeen is other than in the affirmative or negative, then specify with particularity why you are unable to answer in either the affirmative or negative.

ANSWER: Not applicable.

20. State the name, address, unit and rank of the officer or officers in command of the members of the Ohio National Guard who fired their weapons at the time and place of the shooting incident described in the Amended Complaint.

ANSWER: Defendants refuse to answer Interrogatory No. 20 based upon their privilege against possible self-incrimination, United States Code, Amendment Five.

21. State the precise location of defendant Robert Canterbury at the time of the shooting described in the Amended Complaint.

ANSWER: General Canterbury was with the troops on "Blanket Hill" near the Pagoda.

22. Describe the clothing defendant Robert Canterbury was wearing at the time of the shooting described in the Amended Complaint.

ANSWER: Brown business suit with gas mask.

23. Was there any member of the Ohio National Guard on the Kent State University campus at the time of the shooting described in the Amended Complaint of higher rank than defendant Robert Canterbury?

ANSWER: no.

24. State the name, address, unit and rank of each and every member of the Ohio National Guard who was situated anywhere on the campus of Kent State University at any time on May 4, 1970, prior to and during the shooting incident described in the Amended Complaint.

ANSWER: Refer to Exhibit 1 attached hereto.

25. For each member of the Ohio National Guard mentioned in your answer to Interrogatory Number Twenty-Four, state:

- A. The date upon which such member was most recently called into active duty prior to May 4, 1970.
- B. The person or persons most recently ordering such member into active duty;
- C. The reason for ordering such member into active duty;
- D. The specific services rendered by each such member from the time such member was first called into active duty up to and including the time of the shooting incident described in the Amended Complaint;
- E. The specific equipment, including weaponry of any kind which was possessed, used, or controlled by each such member including tear gas, guns, vehicles, knives, etc.;
- F. The complete training history, including times, places, and the names and addresses of training instructors of such member;
- G. The specific name, title and publisher of any and all materials, books, articles, guides, visual aids, instructions, or other tangible or written items of any kind assigned, used, or possessed, read by or

available to each such member in any way connected with his training or service with the Ohio National Guard.

ANSWER: The information contained in Exhibit 3 attached hereto is the only knowledge we presently have pertinent to Interrogatory No. 25 with the following additions:

- (1) All men listed in Exhibit 3 had previously undergone basic training and advanced training;
- (2) Concerning "G", we are not presently aware of all the items named therein, however, there are the "Guidelines for Small Unit Commanders" and the Army field manual on civil disorders.

26. Describe the specific nature and kind of weapon which was fired by each member of the Ohio National Guard who fired a weapon of any kind at the time and place of the shooting incident described in the Amended Complaint, specifying with particularity the name and address of the guardsman firing the weapon and the type of bullet which was fired from that weapon.

ANSWER: Defendants refuse to answer Interrogatory No. 26 based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five.

27. Prior to May 4, 1970, did defendant Governor James Rhodes issue or promulgate any proclamation other than the Proclamation of April 29, 1970, attached as Exhibit 3 to Defendant's Motion to Dismiss?

ANSWER: Governor Rhodes promulgated two Proclamations relevant to the issues defined in the Amended Complaint. The first was issued April 29, 1970, and the second was a supplemental proclamation issued

May 5, 1970, formalizing the Governor's verbal orders to General Del Corso "to maintain peace and order and to protect life and property throughout the State of Ohio."

28. If your answer to Interrogatory Number Twenty-Seven is in the affirmative, describe with specificity each and every such proclamation stating its time, date, place and persons to whom issued or promulgated.

ANSWER: The supplemental proclamation which is also attached to defendant's Motion To Dismiss, Exhibit #3 was executed May 5, 1970, at Columbus, Ohio.

29. For each such aforementioned proclamation in your answer to Interrogatory Number Twenty-Eight, state the name and present address of the present custodian of same.

ANSWER: To the best of our Knowledge, Ted W. Brown, Secretary of State for the State of Ohio, has possession and custody of this proclamation.

30. State the name and address of each and every person who in any manner requested or ordered the presence of the Ohio National Guard on the Kent State University campus on May 4, 1970.

ANSWER: The number of persons requesting and/or ordering the assistance of the National Guard are too numerous to name here; such a list would include many of the citizens of Kent, Ohio. Most prominent among these persons would be:

(1) Governor Rhodes, Executive Proclamations of April 29 and May 5, 1970, Columbus, Ohio.

(2) Mayor LeRoy M. Satrom, Communication to the Commander of Troops of the Ohio National Guard, May 2, 1970.

(3) Portage County Sheriff Joseph Hegedus, Communication to the Commander of Troops of the Ohio National Guard, May 3, 1970.

31. For each such person mentioned in your answer to Interrogatory Number Thirty, state the date, time and place when such order or request was made, and the person or persons to whom and/or in the presence of whom such request or order was made.

ANSWER: Refer to answer to Interrogatory No. 30.

32. For each such person mentioned in your answer to Interrogatory Number Thirty, state fully the reasons, if any, given by that person for his or her request to order.

ANSWER: Governor Rhodes, as stated in his Executive Proclamation of May 5, 1970, ordered the National Guard to Kent State University to meet disorders or threatened disorders and to maintain peace and order in the city of Kent and on the campus of Kent State University is Portage County.

May Satrom ordered the National Guard to Kent, Ohio, because local law enforcement agencies could no longer cope with the situation in Kent May 2, 1970, and troops were needed to restore order and peace to the community.

Sheriff Hegedus requested the National Guard to help protect the persons and property of Kent, Ohio, since local enforcement agencies could no longer adequately protect persons and property in Kent, Ohio nor restore peace and order to this community.

33. Of your own personal knowledge, what were all of the reasons, if any, for the presence of Ohio National Guard troops on the Kent State University campus on

May 4, 1970, prior to and including the time of the shooting incident described in the Amended Complaint.

ANSWER: The Ohio National Guard was requested by various authorities to maintain the peace and order and to protect life and property in Kent, Ohio.

34. At any time or times on the Kent State University campus on May 4, 1970, prior to the shooting incident described in the Amended Complaint, did Ohio National Guard troops attempt to disperse any gathering or assemblage of students or other civilians (hereinafter to be referred to as a "gathering").

ANSWER: Yes.

35. If your answer to Interrogatory Number Third-Four is in the affirmative, state the name and address of each and every person (giving where applicable, unit and rank) who in any way ordered the dispersal of such "gathering" or "gatherings".

ANSWER: Immediately before the incident described in the Amended Complaint, General Canterbury directed a member of the Kent State University Police Department to order the rioters to disperse. Patrolman Harold A. Rice took a bullhorn and, while being driven by a National Guardsman in a jeep, passed many times in front of the rioters ordering them to disperse.

36. For each person mentioned in your answer to Interrogatory Number Thirty-Four, state:

- A. The time when such order was given;
- B. The place where such order was given;
- C. The person or persons to whom such order was given (stating unit and rank where applicable, if any);

- D. The specific reasons, if any, such order was given;
- E. The manner in which the order was to be carried out;
- F. The manner in which the order was in fact carried out; and
- G. The substance of the order.

ANSWER: Refer to the Answer to Interrogatory No. 35.

37. Describe with specificity the hand and/or arm signal or signals which constitute an order to a member of the Ohio National Guard to shoot a gun.

ANSWER: a. Standing position, arms at waist with palms down, arms moved out and to the side.

b. Arm is brought overhead and down pointing to direction fire is to be made.

/s/ SYLVESTER DEL CORSO

/s/ ROBERT CANTERBURY

(Verification, certificate of service and exhibits omitted in printing)

Civil Action No. C70-816

In the United States District Court

**FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ELAINE B. MILLER,
Administratrix of the Estate of
Jeffrey Glenn Miller, Deceased,
Plaintiff,

VS.

JAMES RHODES, etc., et al.,
Defendants.

RELEVANT DOCKET ENTRIES

- 8/24/70 Complaint filed. Summons issued. 4 copies of complaint to Marshal.
- 9/ 1/70 Notice of deft. Srp to take deposition of William W. Scranton on 9/10/70 filed. Copies mailed 9/1/70.
- 10/14/70 Summons retn. & filed. Served Robert White on 8/27/70, served Robt. Canterbury, Sylvester Del Corso & James Rhodes on 8/31/70. Fees \$23.52.
- 11/16/70 Motion of defendants Del Corso, Canterbury, and White to dismiss with memo. in support filed. Copies mailed 11/13/70.
- 11/16/70 Motion of deft., James A. Rhodes, Governor, to dismiss with memorandum filed. Copy mailed 11/13/70.

- 1/19/71 Memorandum of pltf. in opposition to motion to dismiss filed. Copies mailed 1/19/71.
- 4/15/71 Motion of defts. to dismiss filed. Copy mailed 4/14/71.
- 6/ 2/71 Memorandum & Order filed. Connell, J. Complaint Dismissed at Pltf's Cost. Copies to Interested counsel. (See C70-544)
- 6/25/71 Notice of Appeal by pltf. filed. Copies to Brown, Alloway, & Lambros.
- 8/ 5/71 Certified record received in U.S.C.A. and filed. (8-3-71) (71-1623)
- 2/12/73 True copy of Judgment from U. S. Court of Appeals affirming judgment of District Court filed.
- 2/12/73 Opinion from U. S. Court of Appeals filed. (Record Returned)

COMPLAINT IN MILLER CASE

(Filed August 24, 1970)

Civil Action No. C 70-816

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

(Title omitted in printing)

COMPLAINT

Plaintiff, ELAINE B. MILLER, by her attorney, JOSEPH KELNER and associate attorney, ABRAHAM D. SOAFER, for her complaint herein, alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a citizen of the State of New York, residing at 261-71 Langston Avenue, Borough of Queens, City of New York and is the duly appointed administratrix of the estate of **JEFFREY GLENN MILLER**, plaintiff's son, who died on May 4, 1970 at the age of 20, by reason of the actions of the defendants as hereinafter stated; plaintiff has been appointed administratrix of the estate of **JEFFREY GLENN MILLER** by the Surrogate's Court, Queens County, New York.

2. At all times herein mentioned, defendant **RHODES** was Governor of the State of Ohio and exercised certain powers and authority individually and as Governor of the State of Ohio and under color of the laws of the State of Ohio, as its agent, servant and employee.

3. At all times herein mentioned, the defendants, **DEL CORSO**, **CANTERBURY**, **JONES**, **MARTIN**, **SRP**, **STEVENSON** and the various officers and enlisted men of Troop G, G Company, 107th Armored Cavalry Regiment of the Ohio National Guard and A Company, First Battalion, 145th Infantry Regiment of the Ohio National Guard, were on active duty with the Ohio National Guard as officers and enlisted men therein and were acting under color of the laws of Ohio.

4. At all times herein mentioned, the defendant, **WHITE**, was President of Kent State University at Kent Ohio and exercised his powers and authority in such employment and under color of the laws of Ohio.

5. At all times mentioned herein, **JEFFREY GLENN MILLER** was a full time student at Kent State University; and on May 4, 1970 the said **JEFFREY GLENN MILLER** was shot and killed by a bullet fired by one of the members

of the Ohio National Guard in service on the campus at Kent State University; and at the time he was shot the said JEFFREY GLENN MILLER was not engaged in any riotous, aggressive, criminal, improper or provocative acts and was not contributorily negligent in causing his death.

6. This court has jurisdiction pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1331 and 1343 in that plaintiff's cause of action seeks redress for the deprivation under color of state law, of the life of JEFFREY GLENN MILLER, his rights, privileges and immunities secured by the Constitution of the United States, and it arises under Federal law, with the matter in controversy exceeding \$10,000 exclusive of interest and costs.

7. At all times mentioned herein, Kent State University was a state university of Ohio, organized pursuant to the laws of Ohio and had its main campus in the City of Kent, Portage County, Ohio.

8. At all times mentioned herein on May 4, 1970 and prior thereto, the defendants, acting individually and in concert with each other and under color of the laws of the State of Ohio, subjected and caused the said JEFFREY GLENN MILLER to be subjected to the deprivation of his life, his rights, privileges and immunities secured by the Constitution and laws of the United States; that such deprivation was without due process of law in that, by reason of the defendants' actions on May 4, 1970 and prior thereto, plaintiff's decedent, JEFFREY GLENN MILLER, was shot and killed on May 4, 1970 by a bullet fired by one of the aforesaid National Guard members on duty on the campus of Kent State University; and the defendants intentionally, recklessly, willfully and wantonly engaged in the following acts among other things which caused or con-

tributed to the causing of the deprivation alleged herein; that they used and fired live ammunition with the intent to kill JEFFREY GLENN MILLER and other students lawfully upon the said campus; that the officers of the said National Guard ordered the use of said live ammunition and, upon information and belief, gave the orders to fire the same at the said time and place; that they thereby caused the death of the said JEFFREY GLENN MILLER; that by reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million (\$2,000,000) dollars and punitive damages in the amount of (\$2,000,000) dollars against all of the defendants.

AS AND FOR A SECOND CAUSE OF ACTION

9. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs (1) through (8) with the same force and effect as if fully set forth herein.

10. That all of the defendants were reckless, careless and negligent in their failure to take precautions to avoid the occurrence of such shooting; in permitting the use of firearms under the existing circumstances; in permitting the said firearms to be loaded with live ammunition under circumstances not justifying such use; in authorizing and permitting the use of illegal and excessive force and violence in relation to the situation prevailing upon the Kent State campus at such time; in the failure to order and prevent troops of the Ohio National Guard from firing live ammunition at unarmed persons thereat under such or similar circumstances without legal justification; in failure to require the establishment and promulgation of proper rules, regulations and standards which would pro-

hibit the unauthorized use and firing of firearms where the same was unjustified; in the promulgation of rules, regulations and training procedures applicable to civil disturbances which were vague, indefinite and confusing and which authorized and permitted troops to use firearms within their own discretion and without proper standards, safeguards, orders or training prohibiting such improper use of firearms; in the failure to establish and conduct proper training procedures to prevent the happening of such an occurrence; in providing improper and insufficient training of troops for duty under such circumstances; in creating an unreasonable and imminent risk of injury and death to students upon the campus, including **JEFFREY GLENN MILLER**; and all of the defendants were otherwise reckless, careless and negligent.

11. On May 4, 1970 various officers and enlisted men intentionally and without just cause or provocation, fired intentionally at the said **JEFFREY GLENN MILLER** and others with intent to kill, causing the death of **JEFFREY GLENN MILLER** on the campus of Kent State University, in violation of the statutes and laws in such cases made and provided.

12. By reason of the foregoing the plaintiff, individually and as administratrix of the estate of **JEFFREY GLENN MILLER**, and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million (\$2,000,000) dollars and punitive damages in the amount of (\$2,000,000) dollars against all of the defendants.

WHEREFORE, plaintiff prays for judgment against all of the defendants jointly and severally for compensatory damages in the amount of two million (\$2,000,000) dollars and punitive damages in the amount of two million

(\$2,000,000) dollars, together with the costs and disbursements of this action.

/s/ STEVEN A. SINDELL

/s/ JOSEPH KELNER

Attorney for Plaintiff

217 Broadway

New York, New York 10007

(212) 233-7890

MOTION TO DISMISS IN MILLER CASE

(Filed November 16, 1970)

Civil Action No. C70-816

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISMISS

Now come the defendants and respectfully move this Court, pursuant to Rule 12 b(1) of the Federal Rules of Civil Procedure, for an order dismissing both causes of action in the complaint herein because the Court lacks jurisdiction of the subject matter. These defendants are sued in their representative capacities as public officials and agents of the sovereign state of Ohio. Because it appears from the body of the complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, the action is one essentially against the State of Ohio

which has not consented to be sued by waiving its constitutional right to sovereign immunity.

Respectfully submitted,

**CRABBE, NEWLON, POTTS, SCHMIDT,
BROWN & JONES**

42 East Gay Street
Columbus, Ohio 43215
Telephone: 228-5511

By /s/ **CHARLES E. BROWN**

*Attorney for Defendants Sylvester
Del Corso, Robert Canterbury
and Robert White*

(Memorandum in support of motion to dismiss
omitted in printing)

MOTION TO DISMISS IN MILLER CASE

(Filed November 16, 1970)

Civil Action No. C70-816

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

(Title omitted in printing)

MOTION TO DISMISS

1. Now comes the defendant, James A. Rhodes, Governor of the State of Ohio, and respectfully moves this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing both of the alleged causes of action in the Complaint herein for the reasons:

(1) The Court lacks jurisdiction of the subject matter, because this defendant is sued in his representative capacity as a public official and agent of the sovereign state of Ohio; therefore, the action is one essentially against the State of Ohio which has not consented to be sued by waiving its constitutional right to sovereign immunity;

(2) That, as a matter of law, it affirmatively appears from the complaint of plaintiff that, while no negligent, willful or wanton act of defendant James A. Rhodes, Governor, has been committed, it further affirmatively appears that any act or omission on the part of Governor James A Rhodes, defendant herein, was remote from the injury to and death of plaintiff's decedent, and was separated therefrom by a substantial intervening cause.

Respectfully submitted,

TOPPER, ALLOWAY, . GOODMAN, DE-
LEONE & DUFFEY

By /s/ R. BROOKE ALLOWAY,

*Attorneys for Defendant James
A. Rhodes, Governor of the
State of Ohio*

(Memorandum in support of motion to dismiss
omitted in printing)

MOTION TO DISMISS IN MILLER CASE.

(Filed April 15, 1971)

Civil Action No. C70-816

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISMISS

Now come the defendants, Major Harry D. Jones, Captain Raymond J. Srp, and Captain John E. Martin, duly commissioned officers of the Ohio National Guard, and respectfully move this Court, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure for an order dismissing the Complaint herein because the Court lacks jurisdiction of the subject matter:

(a) These defendants are sued in their representative capacity as military officers and agents of the sovereign State of Ohio, because it appears from the caption and the body of the Complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, and the action is essentially against the State of Ohio, and the State of Ohio has not consented to be sued by waiving its constitutional right to sovereign immunity.

(b) Aside from Ohio being the real party in interest and therefore being immune to civil suits, defendants are thus immune to civil suits by the statutory law of the State of Ohio.

(c) It is evident from the body of the Complaint that while no negligent, willful, wanton actions of these defendants has been committed, and it affirmatively appears from the body of the Complaint that any act or omission to act by these defendants was remote from the injury to and death of plaintiff's decedent and was separated therefrom by a substantial intervening cause.

BERGER, KIRSCHENBAUM & LAMBROS

By /s/ C. D. LAMBROS

806 Citizens Building

Cleveland, Ohio 44114

621-0800

*Attorneys for Captain Raymond
J. Srp*

/s/ DELMAR A. CHRISTENSEN

607 Second National Building

Akron, Ohio

*Attorney for Major Harry D.
Jones and Captain John E.
Martin*

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

In support of the foregoing Motion to Dismiss, the defendants adopt and incorporate herein all of the arguments contained in the Memorandum in Support of the Motion to Dismiss filed on behalf of another defendant by the firm of Topper, Alloway, Goodman, DeLeone and Duffey in the within cause, copy of which Memorandum is attached hereto and made a part hereof as if fully written out herein.

Respectfully submitted,

BERGER, KIRSCHENBAUM & LAMBROS

By /s/ C. D. LAMBROS

Attorneys for Captain Raymond J. Srp

/s/ **DELMAR A. CHRISTENSEN**

*Attorney for Major Harry D. Jones and
Captain John E. Martin*

(Certificate of service and attached Memorandum
omitted in printing)

**MEMORANDUM AND ORDER OF DISTRICT
COURT, KRAUSE AND MILLER CASES**

(Filed June 2, 1971)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ARTHUR KRAUSE, Administrator of
the Estate of ALLISON KRAUSE, de-
ceased

Plaintiff,

v.

GOVERNOR JAMES RHODES, *et al.*,

Defendants.

Civil Action No.
C 70-544

ELAINE B. MILLER, Administratrix of
the estate of JEFFREY GLENN MIL-
LER, deceased,

Plaintiff,

v.

JAMES RHODES, *et al.*,

Defendants.

Civil Action No.
C 70-816

SARAH SCHEUER, Administratrix of
the Estate of SANDRA LEE SCHEUER,
deceased,

Plaintiff,

v.

JAMES RHODES, *et al.*,

Defendants.

Civil Action No.
C 70-859

MEMORANDUM AND ORDER

Printer's Note: The opinion and order of the Dis-
trict Court is appended to the Petition for a Writ of
Certiorari herein, Docket No. 72-1318, at pages 34-46.

**OPINION OF THE COURT OF APPEALS
KRAUSE AND MILLER CASES**

(Filed November 17, 1972)

Nos. 71-1622-23-24

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 71-1622

ARTHUR KRAUSE, Administrator, etc.,
Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio, et al.,
Defendants-Appellees.

No. 71-1623

ELAINE B. MILLER, Administratrix, etc.,
Plaintiff-Appellant,

v.

JAMES RHODES, etc., et al.,
Defendants-Appellees.

No. 71-1624

SARAH SCHEUER, Administratrix, etc.,
Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio, et al.,
Defendants-Appellees.

APPEALS FROM UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

OPINION

Printer's Note: The opinion of the U. S. Court of Appeals is appended to the Petition for Writ of Certiorari in the case of *Sarah Scheuer v. James Rhodes, et al.*, Docket No. 72-914, at pages 1a-69a.

**JUDGMENT OF COURT OF APPEALS
IN KRAUSE CASE**

(Filed November 17, 1972)

No. 71-1622

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ARTHUR KRAUSE, ETC. v. GOVERNOR JAMES RHODES, et al.

JUDGMENT

Printer's Note: The judgment of the U. S. Court of Appeals is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at page 28.

**JUDGMENT OF COURT OF APPEALS
IN MILLER CASE**

(Filed November 17, 1972)

No. 71-1623

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ELAINE B. MILLER, ETC. v. JAMES RHODES, et al.

JUDGMENT

Printer's Note: The judgment of the U. S. Court of Appeals is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at page 30.

**ORDER OF COURT OF APPEALS
DENYING PETITION FOR REHEARING,
KRAUSE AND MILLER CASES**

(Filed January 3, 1973)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 71-1622

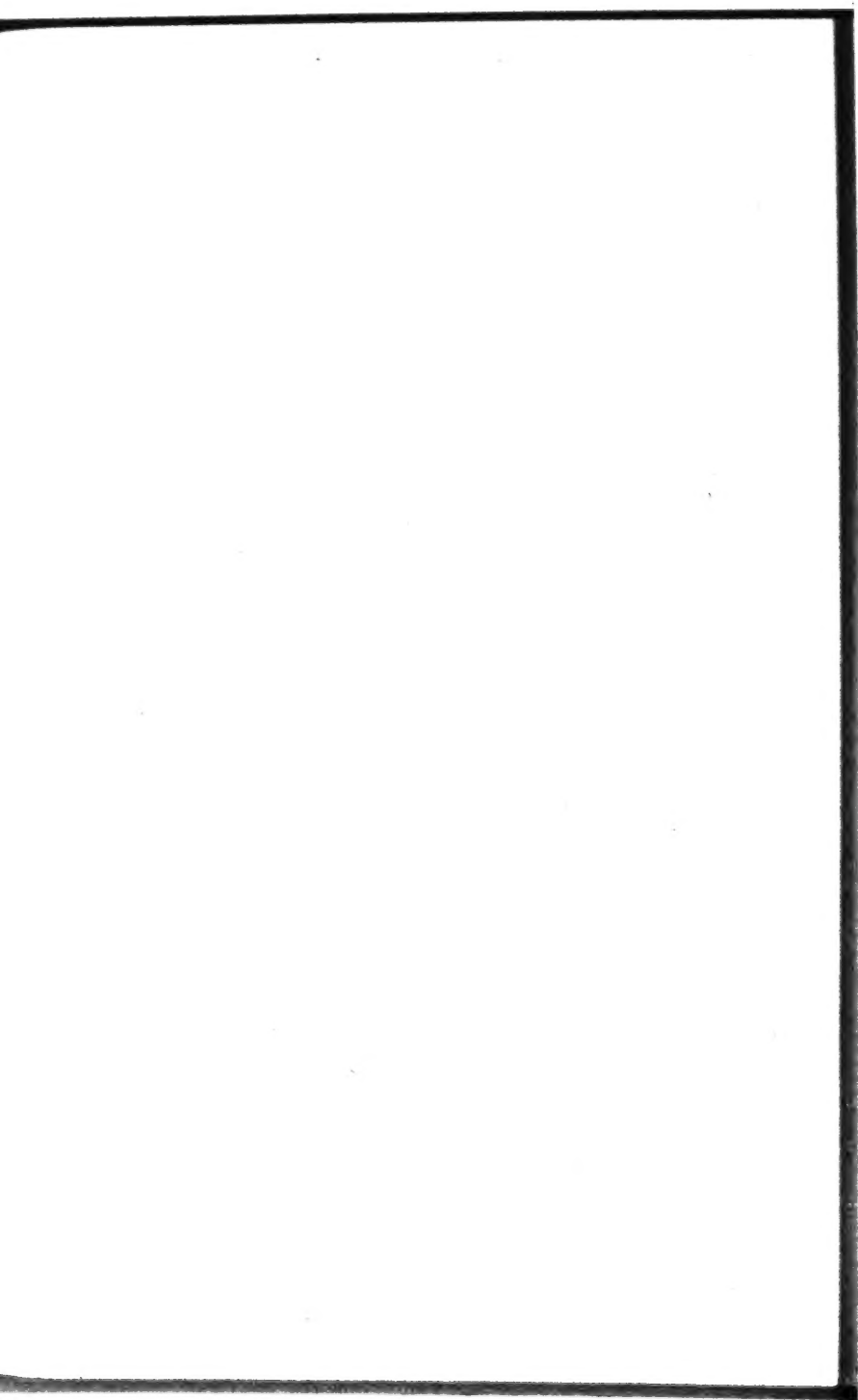
ARTHUR KRAUSE, ETC. v. JAMES RHODES, *et al.*

No. 71-1623

ELAINE B. MILLER, ETC. v. JAMES RHODES, *et al.*

ORDER

Printer's Note: The order of the Court of Appeals denying rehearing is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at pages 32-33.



72-914 SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

Supreme Court, U. S.
FILED

DEC 21 1972

SARAH SCHEUER, Administratrix of the
of Sandra Lee Scheuer, Deceased,

FRANKEL RODAK, JR., CLE

Petitioner,

v.

JAMES RHODES, SYLVESTER DEL CORSO,
ROBERT CANTERBURY, HARRY D. JONES,
JOHN E. MARTIN, RAYMOND J. SRP,
Various Officers and Enlisted Men,
and ROBERT WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL E. GELTNER
LEONARD J. SCHWARTZ

American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF
SANFORD JAY ROSEN
JOEL M. GORA

American Civil Liberties Union
of Ohio Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL

33 Public Square
Suite 210
Cleveland, Ohio 44113

Of Counsel:

STANLEY K. LAUGHLIN, JR.
NIKI Z. SCHWARTZ
MICHAEL S. HARSHMAN
American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

WALTER S. HAFFNER
1008 Standard Building
Cleveland, Ohio 44113

Of Counsel

Attorneys for Petitioner

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE	4
STATEMENT OF THE CASE	5
1. SUMMARY OF THE COMPLAINT	5
2. PROCEEDINGS BELOW	8
REASONS FOR ALLOWANCE OF THE WRIT	11
1. THE ELEVENTH AMENDMENT	11
2. EXECUTIVE IMMUNITY	13
3. REPUDIATION OF RULE 8, FED. R. CIV. P.	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

American Federation of State, County and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir., 1969).....	13
Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972)	5
Barr v. Mateo, 360 U.S. 564 (1959)	15
Bayer v. Chaloux, 288 F. Supp. 366 (N.D.N.Y. 1968)	13
Birnbaum v. Trussel, 347 F.2d 86 (2nd Cir. 1965)	14
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)	12, 14, 15
Board of Trustees of Arkansas A. & M. College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 89 Sup. Ct. 401 (1968).....	13

(ii)

Cases, continued:

Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961)	5
Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971) . . .	5, 14
Conley v. Gibson, 355 U.S. 41, 45-46 (1957)	16
Cruz v. Beto, 405 U.S. 319 (1972).	16
District of Columbia v. Carter, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972).	5, 14
Dunn v. Blumstein, 405 U.S. 330 (1972).	12
Dunn v. Estes, 177 F. Supp. 146 (D. Mass. 1953)	14
Ex Parte Young, 209 U.S. 123 (1908)	11, 13
Ford Motor Co. v. Treasury Department of Indiana, 323 U.S. 459 (1944)	11
Georgia Railroad and Banking Co. v. Redwine, 342 U.S. 299 (1952)	11
Gilligan v. Morgan, No. 71-1553 (October 24, 1972).	7
Great Northern Insurance Co. v. Read, 322 U.S. 47, 50-51 (1944)	12
Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949).	15
Griffin v. Prince Edward County, 377 U.S. 218 (1964) . . .	11
Haines v. Kerner, 404 U.S. 518 (1972)	16
Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972)	5
Jankins v. Averett, 424 F.2d 1228 (4th Cir. 1970)	5
Jenkins v. McKeithen, 395 U.S. 411, 423-424 (1969) . . .	16
Jobson v. Heine, 355 F.2d 129 (2nd Cir. 1965)	14
Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972).	14
Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968)	14
Krause v. Rhodes (No. C70-544, N.D.O., E.D.), 71-1623, 6th Circuit	2

(iii)

Cases, continued:

McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) . . .	14
Meredith v. Allen County War Memorial Hospital Ass'n., 397 F.2d 33 (6th Cir. 1968)	14
Miller v. Rhodes (No. C70-816, N.D.O., E.D.), 71-1623, 6th Circuit	2
Monroe v. Pape, 365 U.S. 167 (1961)	6, 12, 15
Morgan v. Rhodes, 456 F.2d 608 (6th Cir. 1972)	7
Pierson v. Ray, 386 U.S. 547 (1967)	15
Pope v. Williams, 193 U.S. 621 (1904)	12
Puckett v. Cox, 456 F.2d 233 (6th Cir. 1972)	6
Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum to opinion, 456 F.2d 834 (5th Cir. 1972)	6
Scheuer v. Rhodes, et al., (N.D.O., E.D. No. C72-439, May 3, 1972)	6
Scolnick v. Winston, 219 F. Supp. 836, 840 (S.D.N.Y., 1963), aff'd. 329 F.2d 716 (2nd Cir. 1964)	13
Screws v. United States, 325 U.S. 91 (1945)	5, 12
Sostre v. McGinnis, 442 F.2d 178, 205 (2nd Cir. 1971)	13, 14
Spalding v. Vilas, 161 U.S. 483 (1896)	15
Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963)	5
Tenney v. Brandhove, 341 U.S. 367 (1951)	15
Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968)	14
Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969)	13

Statutes:

42 U.S.C. Section 1983	3, 4, 5, 8, 13, 14, 15
28 U.S.C. Section 1343.	4

(iv)

United States Constitution:

Article I	15
Amendment 11	9, 10, 11, 15

Rules:

Rule 8, Federal Rules of Civil Procedure	3, 7, 16
Rule 12 (b), Federal Rules of Civil Procedure	8

Miscellaneous:

3 K.C. Davis, <i>Administrative Law Treatise</i> , Sec. 27.03	13
---	----

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

SARAH SCHEUER, Administratrix of the Estate
of Sandra Lee Scheuer, Deceased,

Petitioner,

v.

JAMES RHODES, SYLVESTER DEL CORSO,
ROBERT CANTERBURY, HARRY D. JONES,
JOHN E. MARTIN, RAYMOND J. SRP,
Various Officers and Enlisted Men,
and ROBERT WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioners request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the United States District Court for the Northern District of Ohio, Eastern Division, which dismissed the Complaint in this action against all defendants.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is included in the Appendix, *infra*,

at pp. 1a-69a. The decision of the Court of Appeals was rendered in this case and in *Krause v. Rhodes* and *Miller v. Rhodes* (No. 71-1623, 6th Cir.), which were consolidated for argument. The Opinion of Judge Weick is at p. 3a. The separate concurring opinion of Judge O'Sullivan is at p. 27a and the dissenting opinion of Judge Celebrezze is at p. 32a.

The opinion of the District Court has not been reported. It, too, was rendered in this case and in *Krause v. Rhodes* (No. C70-544, N.D.O., E.D.) and *Miller v. Rhodes* (No. C70-816, N.D.O., E.D.), which were decided together. The District Court's memorandum opinion and order is included in the appendix at p. 70a.

Because this case was decided on a motion to dismiss directed at the face of the complaint, its text is of particular importance in reading this petition. A copy of the complaint is included in the appendix at p. 83a-92a.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Sixth Circuit was November 17, 1972, which was also the date of entry. No motion for rehearing, or other application, has been filed which would extend the time of filing this petition.¹

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to Title 28, United States Code, Section 1254(1).

¹Petitioner is informed that the plaintiffs in *Krause* and *Miller* have petitioned for reargument in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether an action brought in a United States District Court under Section One of the Civil Rights Action of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.

2. Whether there is a doctrine of unqualified executive immunity which immunizes state officials from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, against the Governor of Ohio, Adjutant General of the Ohio National Guard, officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the outright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State

2. Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. Section 1343(3) and (4), which provide:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

On May 4, 1970, Petitioner's decedent and daughter, Sandra Lee Scheuer, was killed on the campus of Kent State University, Kent, Ohio by a bullet fired by an Ohio National Guardsman who had been ordered to the campus by the Governor of Ohio. As a consequence of an investigation conducted thereafter by Petitioner's counsel, Petitioner commenced this action in the District Court on September 8, 1970.²

1. *Summary of the Complaint*

The first claim in this action is based upon Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983. It charges that the defendants acted in concert and subjected the plaintiff's decedent to a deprivation of rights, privileges and immunities secured by the United States Constitution, specifying that the plaintiff's decedent, when shot by Ohio National Guard troops, was deprived of life without due process of law. The complaint is thus based upon the settled rule that one killed or injured by intentional, reckless, arbitrary or unjustified conduct of state officials is deprived of life or liberty, without due process of law,³ and that such a

²Because of the unusual procedural context of this case—a motion to dismiss was granted without any factual matter offered by the defendants—counsel for Petitioner has, of course, limited the statement of the case to the facts of record, primarily the complaint in this action.

³See, e.g., *Screws v. United States*, 325 U.S. 91 (1945); *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972); *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), cert. granted in part sub. nom. *District of Columbia v. Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961).

deprivation is actionable at law under Section 1983.⁴

The defendants in this action were, at the time it was commenced, the Governor of Ohio, the Adjutant General of the Ohio National Guard and Assistant Adjutant General, three commissioned officers of the Ohio National Guard, unnamed officers and enlisted men of the Ohio National Guard,⁵ and the President of Kent State University. Following the conclusory allegation of deprivation of life without due process of law set forth above, the complaint proceeds to detail the charge as to each defendant with specific allegations of personal misconduct causally related to the death of plaintiff's decedent. Thus, Governor Rhodes is charged, *inter alia*, with ordering Ohio National Guard troops to break up lawful assemblies, permitting them to carry guns loaded with live ammunition and permitting them to shoot at

⁴See Circuit Court decisions cited in footnote 3, above. See also *Monroe v. Pape*, 365 U.S. 167 (1961). To the extent that the complaint might be read as charging, in part, negligent rather than intentional, conduct by state officials resulting in deprivation of life without due process of law, the cases cited in note 3, *supra*, likewise support such a theory. See also *Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.) cert. denied 404 U.S. 866 (1971), addendum to opinion, 456 F.2d 834 (5th Cir. 1972).

⁵The caption describes "various officers and enlisted men" and, in Paragraph 7 of the complaint it is alleged that their names "are not now known to plaintiff" but that they "will be joined . . . as soon as their names become known . . ." On May 3, 1972, plaintiffs filed a successor complaint, treated as a new action. *Scheuer v. Rhodes, et al.* (N.D.O., E.D. No. C72-439, May 3, 1972), naming certain additional National Guardsmen.

persons without justification, Complaint, para. 13(a).⁶ Defendants Del Corso and Canterbury, Ohio National Guard Generals, are charged, *inter alia*, in addition to permitting the use of loaded guns and permitting unjustified shootings, with ordering inadequately trained and incapable troops to engage in conduct which greatly increased the risk of shooting of innocent persons. Complaint, para. 13(b) and (c).

Defendants Jones, Martin and Srp, Ohio National Guard Officers, are charged, in the alternative, with having ordered troops to shoot at persons without legal justification or with having failed to restrain troops under their direct command from unlawful shootings. Complaint, para. 13(d). The unnamed National Guard troops and officers are charged, in substance, with having shot without legal justification or, in the alternative, pursuant to orders which were patently unlawful.

Finally, Defendant White is charged with reckless omission to act when his actions could have decreased the risk of shooting of innocent persons by the Ohio National Guard.⁷

⁶The Pleading pattern of the complaint, following the exhortation of Rule 8, Fed. R. Civ. P. to plead "a short and plain statement of the claim showing that the pleader is entitled to relief . . .," is to allege material facts. It purposely avoids detailed cataloguing of evidence as being inconsistent with the goals of Rule 8.

⁷An additional case filed in the District Court arising from the Kent shootings is *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), cert. granted sub. nom. *Gilligan v. Morgan*, October 24, 1972 (No. 71-1553). That case involves a basic claim that some of the conduct involved in this action, as well as other conduct, was unlawful and deprived persons, including plaintiff's decedent, of constitutionally protected rights. The wrongdoing of the state officials alleged in the *Morgan* complaint, however, extends over

In addition to the foregoing claim arising under 42 U.S.C. Section 1983, the complaint sets forth several pendent causes of action, based on the same facts, arising under the law of Ohio.

The *ad damnum* clause prays for "compensatory damages against all defendants, jointly and severally, in the amount of One Million Dollars (\$1,000,000.00) and for punitive damages in an amount which this Court determines is just and proper . . ." No damages are sought from the State of Ohio, its treasury or its property. Moreover, there is no known mechanism under the law of Ohio by which a judgment against the defendants would entitle the plaintiff to execution of judgment against the State of Ohio, its treasury or its property.

2. Proceedings below

Motions to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., were filed in the district court on behalf of all named defendants on the ground that the action, although nominally against them as individuals, was, in fact, against the State of Ohio. No factual matter was offered by the defendants in support of the motions

the entire period of May 1-4, 1970, and the complaint raises factual issues, some of which are different from those in this action.

The complaint in *Morgan* is included in the appendix, commencing at p. 93a. It is included for comparative purposes primarily because Judge O'Sullivan, in his concurring opinion in the Court of Appeals, treated the presence of certain allegations in the *Morgan* complaint and their absence in *Scheuer* as evidence of "dissembling" and attempted to support dismissal on that basis. Comparison of the two complaints is enough to demonstrate that nothing in the *Morgan* allegations conflicts with those in *Scheuer* and vice versa.

other than copies of proclamations by the Governor of Ohio activating the Ohio National Guard and recording the fact of their having been ordered to active duty in Kent.⁸

Judge Connell granted the motion to dismiss, concluding that "[t]he Eleventh Amendment to the United States Constitution prohibits this Court from exercising jurisdiction in this case . . .",⁹ appendix at 92a. In the course of his opinion, Judge Connell "found",

The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it. (Appendix at 80a).

Neither the good faith of the Governor of Ohio nor the demands of the citizens of Ohio were alleged in the complaint and, as stated above, no factual matter was offered by defendants to support any findings.

The appeal was heard by a panel of the Sixth Circuit consisting of Judges Weick and Celebrezze and Senior

⁸Copies of the Governor's orders can be found appended to Judge Weick's opinion in the Court of Appeals and are reproduced in the appendix at 23a.

⁹While no order of consolidation was ever made to consolidate this case with *Krause v. Rhodes* and *Miller v. Rhodes*, they were apparently all routed to Judge Connell by some mechanism not apparent to counsel. Thereafter, the Clerk of the Sixth Circuit continued to consolidation on appeal.

Judge O'Sullivan. Counsel for defendants attempted to limit the issue on appeal to the question of whether the Eleventh Amendment barred suit, stating, "The sovereign immunity of the State of Ohio, embodied in the Eleventh Amendment, is the only relevant consideration at issue."¹⁰

Judge Weick wrote the Court of Appeals' affirming opinion for himself and Judge O'Sullivan and held "that the actions against the Governor, the officers of the National Guard, and the President of Kent State University, are in substance and effect actions against the State of Ohio. Suits against the State are prohibited by the Eleventh Amendment." (Appendix at 20a). In addition, he held that, "the Governor, the officers of the Guard, and the President of Kent State University all have executive immunity" (*Ibid.*).

Judge O'Sullivan wrote a concurring opinion, finding that, for the defendants to have failed to do what they did "would have been dereliction of duty" (appendix at 30a) and that "[t]he pleadings presented to the District Judge were clearly contrived to hide rather than disclose the true background of the involved events . . ." appendix at 28a).

Judge Celebrezze dissented from the majority opinion in all respects (Appendix at 32a-69a).

¹⁰Brief of all Defendants-Appellees in Court of Appeals at p. 10, incorporated by reference in separate brief of Defendant Rhodes in Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents the most compelling of reasons for allowing the writ. The Court of Appeals has decided a basic issue of constitutional law in a manner in direct conflict with a consistent line of controlling decisions of this Court. Moreover, it has done so in a case of overriding public importance and done so in a manner discrediting to the entire judicial process.

1. *The Eleventh Amendment*

In 1908, this Court firmly established in *Ex Parte Young*, 209 U.S. 123 (1908), the basic tenet of our constitutional law that a state official who engages in conduct in violation of the United States Constitution loses any shield of immunity otherwise possessed by the State. *Ex Parte Young* has been consistently read by this Court as precluding the assertion by a state official that, since suit against the official affects the conduct of the State, the suit is actually against the sovereign. See, e.g., *Griffin v. Prince Edward County*, 377 U.S. 218 (1964); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944). *Ex Parte Young's* applicability to damage actions has been recognized by this Court at least since the case last cited, in which Justice Reed wrote for a unanimous Court,

Where relief is sought under general law from wrongful acts of State officials, the sovereign immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. (citations omitted), 323 U.S. at 462.

See also *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 50-51 (1944).

In this case, the Court of Appeals reasoned that since suit in cases like the present one could affect the conduct of State officials—for example, they could be intimidated from engaging in unconstitutional practices—the State was affected as sovereign.

Judge Celebrezze was certainly correct in asserting, in his dissenting opinion below that,

[T]o hold that the present suits against state officials under Section 1983 are barred by the Eleventh Amendment would in effect overrule the Supreme Court's holding in *Ex Parte Young* ... (appendix at 39a)¹¹

Moreover, this is not a case in which the Court of Appeals, perceiving a break in doctrine in this Court, or in the lower federal courts, justifiably departs from an aged precedent in the fair expectation that, were the question before this Court, it would no longer adhere to its precedent. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972), and cases cited at p. 333 n. 3 predicting demise of *Pope v. Williams*, 193 U.S. 621 (1904). On the

¹¹Actually a very credible argument can be made for the proposition that, even without the *Ex Parte Young* doctrine suit could be maintained in this case without running afoul of the Eleventh Amendment. The position rests on the proposition that a wrongdoing official acts with state authority but that the judgment does not run against the State. See, e.g. *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945). Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The contrary result, however, cannot be reached without directly confronting the principle of *Ex Parte Young*. For a damage action is *a fortiori* allowed under the principle of *Ex Parte Young*.

contrary, the viability of *Ex Parte Young* has not seriously been questioned by this Court. See 3 K.C. Davis, *Administrative Law Treatise* §27.03 at 553. In addition, in the few recently reported cases in other lower federal courts in which the position relied on below was suggested it was rejected as untenable. See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 205 (2nd Cir. 1971); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *American Federation of State, County and Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *Board of Trustees of Arkansas A. & M. College v. Davis*, 396 F.2d 730 (8th Cir.), cert. denied 89 Sup. Ct. 401 (1968); *Bayer v. Chaloux*, 288 F. Supp. 366 (N.D. N.Y. 1968); *Scolnick v. Winston*, 219 F. Supp. 836, 840 (S.D. N.Y. 1963), affirmed 329 F.2d 716 (2nd Cir. 1964).

In short, the decision below can only be characterized as a flagrant rejection of binding precedent. It demands review by this Court.

2. Executive Immunity

Despite the fact that counsel for respondents in the Court below declined to rely on anything but their challenge to the district court's jurisdiction, Judge Weick's opinion relies on the alternative ground that all of the defendants sued were protected by an absolute executive immunity. The application of that doctrine to cases such as this would, of course, have an effect identical to the Court's Eleventh Amendment ground; it would for all practical purposes repeal Section One of the Civil Rights Act of 1871, 42 U.S.C. §1983 insofar as it authorizes damage actions against state officials.¹²

¹²In his concurring opinion, Judge O'Sullivan makes it quite clear that it is his purpose to cripple the Civil Rights Act. Appendix at 27a.

The Court of Appeals' executive immunity determination is in conflict with a consistent line of decisions in other circuits—and even in the Sixth Circuit—which adopt the position that a deprivation of a constitutionally secured right is more serious than a mere tort and therefore not subject to any immunity. See, e.g., *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), cert. granted in part sub. nom. *District of Columbia v. Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Sostre v. McGinnis*, 442 F.2d 178, 205 n. 51 (2nd Cir. 1971) (en banc); *Jobson v. Heine*, 355 F.2d 129 (2nd Cir. 1965); *Birnbaum v. Trussel*, 347 F.2d 86 (2nd Cir. 1965); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972);¹³ *Meredith v. Allen County War Memorial Hospital Ass'n.*, 397 F.2d 33 (6th Cir. 1968); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

To the extent that the decision below and dictum in a few other lower court cases suggest the applicability of executive immunity to actions under 42 U.S.C. §1983, see, e.g., *Dunn v. Estes*, 177 F. Supp. 146 (D. Mass. 1953), this would be an appropriate occasion for this Court to resolve the matter.¹⁴

¹³ Judge Weick's dissenting opinion in *Jones*, 359 F.2d at 84-85, when compared to his opinion in this case, demonstrates his refusal to adhere to *stare decisis* in his own circuit, as well as that laid down by this Court.

¹⁴ The claim of executive immunity to damage actions for deprivation of a constitutional right was before the Court in *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, 403 U.S. 388 (1971), but was not decided because not considered

The primary reason for review as to this point, however, is that the Court of Appeals has placed the second leg of its holding on executive immunity in an effort to shore up its untenable position on the Eleventh Amendment. It would be a grave injustice to permit the Court of Appeals to insulate a basically lawless decision from review by adopting an alternative ground of

in the Court of Appeals. On remand, the Panel of the Second Circuit held the particular defendants not immune but, in a departure from its precedents cited *supra*, suggested that supervisory persons might be immune. 456 F.2d 1339 (2nd Cir. 1972).

There are no direct precedents in this Court. In *Barr v. Mateo*, 360 U.S. 564 (1959), four members of the Court concurred in Justice Harlan's opinion holding a federal agency head immune to suit for common law libel. Justice Black's fifth vote was premised on his antipathy to libel actions. The *Barr* opinion of Justice Harlan adopted the position of Judge Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), cert. denied, 339 U.S. 949 (1950), applying absolute immunity to the Attorney General of the United States in a common law false imprisonment action. Of note as to *Gregoire* is the fact that the Civil Rights Act charge in *Gregoire* was invalid because the action was against federal officials. As a consequence, Judge Hand expressly refused to consider whether his decision was applicable in a Civil Rights Act case. Justice Harlan, who wrote *Barr*, has twice expressed himself as seeing deprivations of constitutional rights as different in kind and more serious than state law torts. *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (concurring opinion). See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The many circuit court decisions rejecting executive immunity under 42 U.S.C. Section 1983 primarily do so on the ground that, whereas legislative immunity had independent precedent in the "Speech and Debate" clause of Article I, see *Tenney v. Brandhove*, 341 U.S. 367 (1951), and judicial immunity has long-standing historical roots, see *Pierson v. Ray*, 386 U.S. 547 (1967), no suggestion of executive immunity appeared in American law until long after adoption of the Civil Rights Act of 1871. See *Spalding v. Vilas*, 161 U.S. 483 (1896).

decision which is itself against the great weight of authority.

3. *Repudiation of Rule 8, Fed. R. Civ. P.*

Of the three judges in the courts below who have voted against Petitioner's position on the law, two have expressly refused, in their opinions, to adhere to the long-standing rule that, in testing the sufficiency of a complaint, its allegations must be treated as true. See, e.g., *Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 518 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 423-424 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Judge Connell took the unusual step of finding "good faith" on allegations which could only be read as alleging bad faith. Judge O'Sullivan's refusal to treat the pleadings as true is even more passionate. He accuses counsel of "dissembling" and "contriving" to hide the true facts and comes very close to concluding, on the basis of "judicial notice," that the killings were justified.

On the basis of such unprincipled conduct, it would be a rejection of reality to engage in the presumption that the decision of Judge Connell and the vote of Judge O'Sullivan were not caused, at least in part, by their views of the facts. The record supports the fair inference—indeed it was placed there by the written opinions—that Petitioner has been denied a chance to prove her case because two judges prejudged the facts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals. In addition, it is suggested that a summary reversal on the papers is appropriate, both because of the nature of the decision below and because of the fact that it has now been almost eighteen months since the district court dismissed the case, suspending pretrial discovery and retarding its progress.

Respectfully submitted,

MICHAEL E. GELTNER
LEONARD J. SCHWARTZ

American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215
Telephone No. 614/422-0925

MELVIN L. WULF
SANFORD JAY ROSEN
JOEL M. GORA

American Civil Liberties Union
of Ohio Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL
33 Public Square
Cleveland, Ohio 44113

WALTER S. HAFFNER
1008 Standard Building
Cleveland, Ohio 44113

THE FIRST PART OF THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE EAST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE WEST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE SOUTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE NORTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE EAST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE WEST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE SOUTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE NORTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE EAST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE WEST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE SOUTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE NORTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE EAST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE WEST

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE SOUTH

AND THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE NORTH

Nos. 71-1622-23-24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1622

ARTHUR KRAUSE, Administrator of the Estate of
ALLISON KRAUSE, deceased

Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio,
and

SYLVESTER DEL CORSO, Adjutant General of
the Ohio National Guard,

and

ROBERT CANTERBURY, Brigadier General and
Assistant Adjutant General of The Ohio Na-
tional Guard,

Defendants-Appellees.

No. 71-1623

ELAINE B. MILLER, Administratrix of the Estate
of JEFFREY GLENN MILLER, deceased,

Plaintiff-Appellant,

v.

JAMES RHODES, individually and as Governor
of the State of Ohio, SYLVESTER DEL CORSO,
ROBERT CANTERBURY, HARRY D. JONES, JOHN
E. MARTIN, RAYMOND J. SRP, ALEXANDER
STEVENSON and VARIOUS OFFICERS AND EN-
LISTED MEN, true names presently unknown,
being members of G Company, 107th
Armored Cavalry Regiment and A Com-
pany, First Battalion, 145th Infantry Regi-
ment of the Ohio National Guard, and ROB-
ERT WHITE,

APPEALS from
United States
District Court
for the North-
ern District of
Ohio, Eastern
Division.

2 Krause, Admr., et al. v. Rhodes, et al. Nos. 71-1622-23-24

No. 71-1624

SARAH SCHEUER, Administratrix of the
Estate of SANDRA LEE SCHEUER, de-
ceased,

Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State
of Ohio,

and

SYLVESTER DEL CORSO, Adjutant Gen-
eral of the Ohio National Guard,

and

ROBERT CANTERBURY, Assistant Adju-
tant General of the Ohio National
Guard,

and

HARRY D. JONES, a Major of the Ohio
National Guard,

and

JOHN E. MARTIN, and RAYMOND
SRP, Captains of the Ohio National
Guard,

and

VARIOUS OFFICERS AND ENLISTED MEN,
members of G Company, 107th
Armored Cavalry Regiment and A
Company, First Battalion, 145th In-
fantry Regiment of the Ohio Na-
tional Guard,

and

ROBERT WHITE, President, Kent State
University,

Defendants-Appellees.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 3

Before: WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. The Governor of Ohio called out the Ohio National Guard to suppress a riot in the City of Kent, Ohio, and on the campus of Kent State University. Two proclamations of the Governor with respect thereto are appended to this opinion. They were attached to motions to dismiss filed by certain defendants in the District Court. During the riot each of the plaintiffs' decedents, who were students at Kent State University, allegedly were shot and killed by one of the unnamed and unknown members of the National Guard. Their personal representatives filed separate actions in the District Court to recover a total of \$11,000,000 — damages against the Governor of Ohio, the Adjutant General, and the Assistant Adjutant General. Two of the suits named four officers and various unknown and unnamed officers and enlisted men of the National Guard. The two suits even named the President of Kent State University as a defendant, in one of which suits it was alleged that he recklessly, wilfully and wantonly omitted to take any action to control the troops on the campus, or to decrease the risk of injury to the students, and in the other suit he was charged with a conspiracy. The suits were brought under the Civil Rights Act, 42 U.S.C. §§ 1983, 1331, 1334, and also under the wrongful death statutes of Ohio, on the theory of pendent jurisdiction.

The complaints alleged generally and in conclusory terms that the defendants conspired to call out the National Guard and were guilty of wanton, wilful and negligent conduct when they knew or should have known that there was no cause or insufficient cause therefor; that the troops were not properly trained in the correct and reasonable use of weapons to suppress civil disorders; and that the troops were permitted to be armed with loaded weapons. It is alleged that as a result the decedents, who allegedly were not participating in

4 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

any way in a riot and were not negligent in any manner, were shot and killed.

The motions to dismiss were filed by the defendants Rhodes, Del Corso, Canterbury, Jones, Martin and Srp. These defendants were the only defendants who were served with process in the cases in the District Court, or who filed motions in the cases.

The theory of the motions to dismiss was that these suits, although nominally against the Chief Executive and officers of the State, in substance and effect were against the State of Ohio since they directly and vitally affected the rights and interests of the State in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public.

It was on this theory and that of executive immunity that the District Court dismissed the actions and the plaintiffs have appealed.¹ We affirm.

Amendment XI of the Constitution of the United States provides:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the citizens of another State"

¹ Plaintiff Krause filed a similar suit against the State of Ohio in the Court of Common Pleas of Cuyahoga County, Ohio, which was dismissed on the ground of sovereign immunity. On appeal a divided Appellate Court reversed the Common Pleas Court and held that the State was amenable to suit and that the individual officers of the State had immunity. *Krause v. State*, 28 Ohio App.2d 1 (1971). In so holding the State Appellate Court did not follow a long line of decisions of the Supreme Court of Ohio, going back as far as 1840. Certiorari was granted by the Supreme Court of Ohio, and on July 19, 1972, the Supreme Court of Ohio reversed the Appellate Court, and held:

"The State of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly." (Syl. 1) (*Krause, Admr., Appellee v. State of Ohio, Appellant*, 31 Ohio St.2d 132 (1972) certiorari pending).

In a concurring opinion Justice Corrigan sharply criticized the Appellate Court for flouting the Supreme Court of Ohio opinions.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 5

In *Ex Parte New York*, 256 U.S. 490 (1921), the Supreme Court held:

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

The Court made it clear that the applicability of the Eleventh Amendment "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Id.* at 500.

The general rule was stated in *Dugan v. Rank*, 372 U.S. 609 (1963), as follows:

"The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Corp.*, *supra*, at 704; *Ex parte New York*, 256 U.S. 490, 502 (1921)."

Moyer v. Peabody, 212 U.S. 78 (1909), like the present case, was an action brought under the Civil Rights Act to recover damages against the former Governor of Colorado, the former Adjutant General of the National Guard of the same state, and a Captain of a company of the National Guard,

6 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

for an imprisonment of plaintiff by them while in office. In upholding the dismissal of the complaint on demurrer, Justice Holmes stated:

"In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. The constitution is supplemented by an act providing that 'when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same.' Laws of 1897, c. 63, Art. 7, § 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. If we suppose a Governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the Governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end." (p. 84-85)

He further said:

"When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 7

of executive process for judicial process. See *Keely v. Sanders*, 99 U.S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case. As we have said already, it is unnecessary to consider whether there are other reasons why the Circuit Court was right in its conclusion. It is enough that in our opinion the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.' See *Dow v. Johnson*, 100 U.S. 158." (*Id.* at 85-86).

In *Sterling v. Constantin*, 287 U.S. 378 (1932), Chief Justice Hughes, in referring to *Moyer v. Peabody*, *supra*, stated:

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. *His decision to that effect is conclusive.* That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, 'necessarily results from the nature of the power itself, and from the manifest object contemplated.' The power 'is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.' *Martin v. Mott*, 12 Wheat. 19, 29, 30. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther v. Borden*, 7 How. 1, 45; *Moyer*

8 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

v. Peabody, 212 U. S. 78, 83. The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer v. Peabody*, *supra*, the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor 'may kill persons who resist,' he 'may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.' In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Carroll v. Carroll's Lessee*, 16 How. 275, 287; *Myers v. United States*, 272 U. S. 52, 142." (*Id.* at 399-400; emphasis added).

In *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), which was an action under the Civil Rights Act for damages against federal officers for false arrest, Chief Judge Learned Hand who wrote the opinion for the Court said:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be

10 *Krauss, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. For the foregoing reasons it was proper to dismiss the first count."

In *Barr v. Matteo*, 360 U.S. 564 (1959), Mr. Justice Harlan, who wrote the opinion for the Court, stated,

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

Justice Harlan then quoted the language of Learned Hand from *Gregoire v. Biddle*, hereinbefore set forth, and stated:

"We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." (Footnotes omitted)

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court said in discussing legislative immunity:

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 11

"The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455."

Bradley v. Fisher, 80 U.S. 335 (1871), and *Alzua v. Johnson*, 231 U.S. 106 (1913), upheld judicial immunity even though acts were in excess of jurisdiction and were alleged to have been done corruptly and maliciously.

Although occasionally both legislators and judges have been charged with depriving individuals of their constitutional rights, they have unquestioned immunity from suit. *Gregoire v. Biddle*, *supra*, and *Barr v. Matteo*, *supra*, applied the immunity to the Executive Department for the same reasons that it was extended to legislators and judges. The Executive Department is charged with the duty of protecting not only the other two departments of government but also the general public from domestic as well as foreign enemies. Such protection is the highest duty the Executive Department is obligated to perform.² It would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court, in a multitude

² As well stated by Mr. Justice White, "The most basic function of any government is to provide for the security of the individual and of his property." *Miranda v. Arizona*, 384 U.S. 436, 539 (1966), White, J., dissenting.

12 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

of protracted actions, because he called out troops to suppress riots or disorders which resulted in injury. It would surely take a hardy executive to exercise his discretion by calling out troops to suppress a riot or insurrection, if he knew that in so doing the wisdom of his action could later be challenged in the courts. And since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the Executive.

To place a straightjacket on the state's Chief Executive in times of emergency so that he could not freely exercise his discretion, would indeed stop the state government "in its tracks." *Dugan v. Rank, supra*, at 621; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 at 704 (1949); *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971).

The suit against the state executives in this case, while not asking for a money judgment against the state, would seriously "interfere with public administration", would "restrain the Government from acting", and would "compel it to act". *Dugan v. Rank, supra*.

Ex Parte Young, 209 U.S. 123 (1908), relied upon by the appellants is inapposite. It was an action for injunction to prohibit a state attorney general from enforcing an unconstitutional state statute which fixed confiscatory rates and interfered with interstate commerce. Our case, on the other hand, is an action for damages and also involves the question whether the federal courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and protect the public.

Article III, Section 10 of the Ohio Constitution provides that the Governor shall be Commander in Chief of the military and naval forces of the state except when they are called into service of the United States. Article IX Section 3 provides that the Governor has power to appoint the adjutant general, quartermaster general and other staff officers. Article IX Section 4 provides that he has the "power to call

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 13

forth the military to execute the laws of the state, to suppress insurrection, and repel invasion."

Pertinent provisions of Ohio statutes relating to the militia are as follows:

Ohio Revised Code, Section 5923.21,

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

Ohio Revised Code, Section 5923.22,

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

"No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws of the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

Ohio Revised Code, Section 5823.37 (Supp.),

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

Ohio Revised Code, Section 2923.55 (Supp.),

14 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

"Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the organized militia, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to section 2923.51 of the Revised Code, are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense."

Kent State University is a state institution. Ohio Rev. Code § 3341.01. Its Board of Trustees is appointed by the governor with the advice and consent of the senate. Ohio Rev. Code § 3341.02(B).

Ohio has long applied the doctrine of sovereign immunity not only to suits against the state but also to its agencies and instrumentalities. *Board of Commissioners v. Mighels*, 7 Ohio St. 110 (1857); *Palmer v. State*, 96 Ohio St. 513 (1917); *Palumbo v. Industrial Commission*, 140 Ohio St. 54 (1942); *State ex rel. Williams v. Glander*, 148 Ohio St. 188 (1947); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49 (1959).

In *Glander*, the Court approved and quoted the following language from American Jurisprudence:

"While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 15

state is a necessary party defendant, and if it cannot be made a party, that is, if it has not consented to be sued, the suit is not maintainable. The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court."

Glander was approved and followed in *Krause v. State*, 31 Ohio St.2d 132, 134, 142 (1972) certiorari pending.

In *Palmer v. State*, 248 U.S. 32 (1918), which grew out of *Palmer v. State*, 96 Ohio St. 513 (1917), the Supreme Court held:

"The right of individuals to sue a State, in either a federal or state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State."

The State of Ohio has not consented to be sued in either the state or federal courts.³

Lower court cases holding that State universities are not amenable to suits in tort actions are:

Thacker v. Board of Trustees, 29 Ohio Misc. 33, following *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49 (1959); *Carolyn v. Youngstown State University*, unreported, 7th Dist. Court of Appeals dismissed by Supreme Court of the United States, No. 71-569, 40 Law Wk. 3310.

In *Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971),

³ While the Civil Rights Act (§ 1983) was recently held to be within an exception to the anti-injunction statute (28 U.S.C. § 2283) forbidding federal courts from issuing injunctions against state courts, *Mitchum v. Foster*, 407 U.S. 225 (1972), the Eleventh Amendment contains no exceptions. We ought not to engraft an exception on the Amendment by judicial construction.

we held that an Administrator of a Veterans Hospital and the institution's psychiatrist had executive immunity.⁴

In our judgment, President White had executive immunity. No possible claim for relief, other than in conclusory language, was stated against him.

Relative to the allegations in the complaint that the members of the National Guard were permitted to carry loaded weapons and that they were not properly trained for suppressing civilian riots and disturbances, it is clear that the judiciary ought not to involve itself in determining military or political questions. Our expertise does not extend to that field. We ought not to limit the Governor in the exercise of his discretion to call out the National Guard to suppress a riot or insurrection; neither should we tell the military not to carry loaded weapons to protect the troops when someone may shoot or throw rocks at them.

Bright v. Nunn, Governor, 448 F.2d 245 (6th Cir. 1971), involved a riot on the campus of the University of Kentucky at Lexington following the Kent State riots, during the course of which the ROTC building and several other buildings were destroyed by fire. An adjoining dormitory for women had to be evacuated in the middle of the night. Rocks were thrown at teachers, security officers, and a policeman. A meeting of the Board of Trustees was disrupted. Outside agitators were on the campus, some of whom were convicted felons, and one was an arsonist. The trouble in that case was that the Guard was not called out soon enough to prevent the destruction of property. When the Guard was finally called out

⁴ In *Martone v. McKeithen*, 413 F.2d 1373 (5th Cir. 1969), the Court, relying on *Barr v. Matteo*, *supra*, and *Gregoire v. Biddle*, *supra*, held that the Governor of the state has immunity from damage suits for acts within the sphere of executive activity; that the members of the Labor-Management Commission and four investigators on its staff had legislative immunity; and the grand jurors had judicial immunity. Officials of the Department of Justice also have immunity. *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964). Allegations of malice are not sufficient to prevent the application of executive immunity. *Pierson v. Ray*, 386 U.S. 547 (1967), is authority for the proposition that Section 1983 does not abolish the immunity of public officers from suit.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 17

the disturbances were promptly quelled. The President of the student body, joined by the local chapter of the American Association of College Professors, brought a class action in behalf of the students and professors against the governor and the President of the University alleging that their rights of speech and assembly had been denied them by the presence of the troops on the campus, and they asked for declaratory relief determining the impropriety of such actions and an injunction against further invasion of their asserted rights. The District Court dismissed the complaint following an evidentiary hearing. We affirmed.

The federal government is inextricably involved with the states in the training and weaponry of the National Guard. The involvement is stated very well in the dissenting opinion of Judge Celebrezze in *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), wherein he said:

"I find a 'textually demonstrable constitutional commitment' of National Guard training and weaponry to a coordinate political department under Article I, Section 8, Clause 16, of the United States Constitution, which provides that Congress shall have the power

'To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.'

"Pursuant to this constitutional authority, Congress has enacted legislation which governs the training and weaponry of the National Guard. 32 U.S.C. §§ 501-07, 701. Moreover, Congress has expressly provided that

'The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.' 32 U.S.C. § 110.

And under 32 U.S.C. § 108, the President has available the following means by which to enforce any regulations which he or the Congress may prescribe for the National Guard:

'If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.'

"The potential effectiveness of this sanction is evidenced by the fact that '[t]he Federal Government pays for 90 percent of the operating costs, virtually all of the equipment, and nearly half of the cost of the physical installations and facilities' of the National Guard. *Report of the National Advisory Commission on Civil Disorders* at 498 (Bantam ed. 1968)."

"This power to prescribe and enforce regulations for the training and weaponry of the National Guard, which Congress has delegated in part to the President, is more than a mere token and unexercised authority. In July of 1967, when civil disorders had come to the forefront of national concern, President Johnson announced that he had ordered the addition of special training courses to the existing National Guard training program. *Weekly Compilation of Presidential Documents*, Vol. 3, No. 30, at 1056 (1967). Moreover, under the authority delegated to the President, the Department of the Army has specifically set mandatory riot-control training requirements for all Army National Guard and certain Air National Guard units. See *Report of the National Advisory Commission on Civil Disorders*, *supra*, at 505.⁵

"I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly pre-

⁵ Presidents have called out troops to suppress disorders, enforce orders of the federal courts and even to prevent disorders at political conventions. It could hardly be maintained that the President of the United States is not protected with Executive immunity. (Footnote ours.)

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 19

cludes any form of judicial regulation of the same matters. I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a

'coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.' *Baker v. Carr*, *supra*, 369 U.S. at 217.

Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction."

It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12b and 19, Fed.R.Civ.P. Any decision rendered by the District Court relative to the training and weaponry of the Guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the Court. The United States has not consented to be sued.

It is obvious from a reading of the complaints that the plaintiffs do not know who fired the shots that resulted in the deaths of their decedents. In two of the complaints they have sued "Various Officers and Enlisted Men, true names

presently unknown, being members of G Company, 107th Armored Cavalry Regiment and A Company, First Battalion, 145th Infantry Regiment, of the Ohio National Guard." The two plaintiffs may not bring into court an entire regiment of troops merely by suing "various officers and enlisted men, true names presently unknown." The unnamed Officers and Enlisted Men were not served with process and were not properly before the District Court. It had no jurisdiction over them.

Furthermore, no relationship of respondeat superior existed between the unnamed enlisted men and the named and unnamed officers and the Governor of Ohio. The enlisted men, as well as the officers of the Guard, were all agents and servants of the State of Ohio.

The allegation of conspiracy, without stating any supporting facts, is a pure conclusion of law.

We hold that the actions against the Governor, the officers of the National Guard, and the President of Kent State University, are in substance and effect actions against the State of Ohio. Suits against the State are prohibited by the Eleventh Amendment. The Governor, the officers of the Guard, and the President of Kent State University all have executive immunity. The unnamed and unknown officers and enlisted members of the Guard, none of whom was served with process, were not before the District Court, and it had no jurisdiction over them.

THE DISSENT

With all due respect to our brother, we have difficulty in following his lengthy and labored dissenting opinion. We are unable to reconcile it with his partial dissent in the case of *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), wherein he stated rather clearly that the federal government was inextricably involved in the training and weaponry of the National Guard. (*Id.* at 618, *et seq.*). If this is true, the suit should also be against the Federal Government. The United

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 21

States is an indispensable party; there is a defect of parties. But, as we have pointed out, the Federal Government is not amenable to suit, and neither is the state.

According to the dissent, the constitutional rights of a citizen may even be violated flagrantly by legislators and judges, with impunity, because they have immunity. He relies on *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Pierson v. Ray*, 386 U.S. 547 (1967). See also *Bradley v. Fisher*, 80 U.S. 335 (1871); *Alzua v. Johnson*, 231 U.S. 106 (1913).

Where immunity exists, it cannot be defeated by allegations that the defendant acted maliciously. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949); *Tenney v. Brandhove*, *supra*.

We think the dissent incorrectly applies Ohio law. In *State ex rel Williams v. Glander*, 148 Ohio St. 188 (1947), the Supreme Court of Ohio made it clear that the common law rule of immunity cannot be evaded by bringing a suit nominally against a state officer when the real claim is against the state itself. *Glander* was approved by the Supreme Court in *Krause v. State*, 31 Ohio St.2d 132 (1972), wherein the Court held that the state had not waived immunity with respect to the claim of one of the appellants in these appeals.

Nor do we agree with the dissent's interpretation of Ohio Revised Code § 5923.37 (Supp.) which states:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

This statute is in derogation of the common law of the state and must be strictly construed. *Lee Turzillo Contracting Co. v. Cincinnati Metropolitan Housing Authority*, 10 Ohio St. 2d 5 (1967). It must be read in *pari materia* with Sections

22 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

5923.21, 5923.22 and 2923.55 hereinbefore quoted, and must be considered in the light of *State ex rel Williams v. Glander, supra*.

It applies only when a *member* of the Guard is ordered to duty by state authority. In the present case the members of the Guard were ordered to duty by state authority, namely, the Governor of Ohio. The liability part of the statute thus applies only to the members of the Guard and not to the Governor, who was already protected by executive immunity without limitation thereon. Furthermore, there is no averment in the pleadings that the Governor was at the "scene" at the time of the shooting.

The officers of the Guard can be held liable only for their own conduct. They are not liable for negligence or willful and wanton conduct on the part of members of the Guard, as these members are agents of the state of Ohio and are not servants of the officers. The complaints do not state claims upon which relief can be granted.

It is also clear that the District Court had no jurisdiction of the diversity claim of Sarah Scheuer, as she is a resident of Ohio.

Not one Ohio case is cited in the dissent wherein the Governor, the officers or members of the Guard, have been held liable in a civil action for acts performed in the suppression of insurrection. They obviously are not responsible for any dereliction of the Federal Government in the training and weaponry of the Guard, in which it is inextricably involved; nor are they liable under Ohio law for negligence.

We ought not to deter the Chief Executives of either the state or the nation in the *unflinching* performance of their duty to protect the public, nor should we make their actions in this respect in times of emergency, subject to judicial review.

The Civil Rights Act, § 1983, cannot be engrafted on the Eleventh Amendment by judicial construction.

Affirmed.

APPENDIX**EXHIBIT I**

State of Ohio

EXECUTIVE DEPARTMENT

Office of the Governor

Columbus

PROCLAMATION

WHEREAS, in northeastern Ohio, particularly in the counties of Cuyahoga, Mahoning, Summit and Lorain, and in other parts of Ohio, in particular Richland, Butler and Hamilton Counties, there exist unlawful assemblies and roving bodies of men acting with intent to commit felony and to do violence to person or property in disregard of the laws of the State of Ohio and the United States of America; and

WHEREAS, said unlawful assemblies and bodies of men have by acts of intimidation and threats of violence put law-abiding citizens in fear of pursuing their normal vocations in the transportation industry; and

WHEREAS, local government officials, including sheriffs and their deputies and municipal police departments, are unable with their own forces to bring about a cessation of violence and reduce the believability of threats of violence; and

WHEREAS, troops of the Ohio National Guard, in coordination with the Ohio State Highway Patrol and local peace officers, can bring about a restoration of confidence in the ability of citizens to move freely in the conduct of their business over the streets and highways of the State; and

WHEREAS, the Mayors of many Ohio cities, after taking counsel with each other, have urgently requested that the Governor make available the troops of the Ohio National Guard to assist in maintaining order and in restoring freedom of transportation movement,

24 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General, and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent necessary to determine the objects to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The Adjutant General shall provide all transportation, services, and supplies necessary for the militia; and all statutory provisions requiring advertisement for bids in relation to their procurement are hereby suspended.

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in a time of public danger.

This proclamation shall continue in force until revoked.

(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 29th day of April, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:

Ted W. Brown
Secretary of State

EXHIBIT II

State of Ohio
EXECUTIVE DEPARTMENT
Office of the Governor
Columbus

PROCLAMATION

WHEREAS, on April 29, 1970, the Governor of Ohio as commander-in-chief issued verbal orders to the Adjutant General of Ohio directing him to call-up such units of the Ohio National Guard as in his judgment might be necessary or desirable to meet disorders and threatened disorders relating to wildcat strikes in the truck transportation industry, and to meet disorders or threatened disorders on campuses of Ohio State University in Franklin County, and campuses of other state-assited universities; and

WHEREAS, pursuant to Section 5923.231 of the Ohio Revised Code, the Governor of Ohio thereafter on April 29, 1970 issued his Proclamation ordering into active service such personnel and units of the militia as the Adjutant General might designate "to maintain peace and order and to protect life and property throughout the State of Ohio;" and

WHEREAS, pursuant to the verbal orders aforementioned, the Adjutant General of Ohio called to active service units of the Ohio National Guard and assigned them variously to service in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County. In addition to divers specific assignments related to restoration of order in the truck transportation industry; and

WHEREAS, it is desirable to make a written record, both events and the derivation of authority exercised by personnel and units of the Ohio National Guard in Portage County and Franklin County.

26 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby supplement my Proclamation of April 29, 1970, by specifying that personnel and units of the militia as may or may have been designated by the Adjutant General to maintain peace and order in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County, are included in the call to active service hereinbefore referred to; and said Adjutant General and through him the commanding officer of any organization of said militia is and was ordered to take action necessary for the restoration of order in the city and on the campuses aforesaid. The military forces involved are and were ordered to act in aid of the civil authorities, and the Adjutant General was directed to consult with them to the extent necessary to determine the object to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The active military duty herein further delineated is again designated as service in time of public danger.

This Proclamation shall continue in force until revoked with my Proclamation of April 29, 1970.
(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 5th day of May, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:
Ted W. Brown
Secretary of State

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 27

O'SULLIVAN, Senior Circuit Judge, concurring. I concur in the opinion of Judge Weick, but I think it right to say this much more. The dissenting opinion states:

"The burden upon state officials to defend these suits — the nonmeritorious as well as the meritorious — is but a small price to pay for the protection of constitutional rights."

I cannot agree that what is being done in this case — suing all of the defendants, from the Governor of Ohio to the private soldiers of the Guard, in their *individual* capacities — "is but a small price to pay for the protection of constitutional rights." To escape the immunities which protect the state from suit, plaintiffs here seek to cast heavy burdens upon public officials and servants to pay out of their own pockets to provide for their defense for having sought, as their duties commanded, to protect those endangered by lawlessness.

In this case, we deal again with the ever-widening employment of Section 1983 for a purpose "not plainly apparent from its language,"¹ as such language was employed by the Congress when it adopted the Section in 1871 to combat some of the wrongs of our post-Civil War society. Currently, however, many courts have provided Section 1983 with new uses and much popularity — crowding today's courts with such volume of claimed causes of action as to seriously impair the judiciary's ability to meet its total burden of protecting American society.²

The dissent charges that the majority opinion "constitutes judicial repeal of an act of Congress." Certainly neither this Court nor any other has authority to repeal the Acts of Congress. Neither have we the right to amend the Acts of Congress by finding purposes in them outside the obvious Congressional intention in enacting them.

¹ 82 Harvard Law Review 1486 (1969).

² Younger, *State v. Uncle Sam*, 58 A.B.A. J. 155 (1972).

28 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

The pleadings in the case before us, except by extravagant conclusional allegations and some dissembling, strive to avoid threshold dismissal. The complaints, with apparent deliberateness, omit any mention of what had been taking place on the campus of Kent State University that occasioned the presence there of the Ohio National Guard. The dissent asserts that the Guard was called to active duty on the day of the events here involved "to protect against violence arising from a wild-cat strike in the truck transportation industry," but fails to mention that the Governor's May 5 Proclamation mentioned that the Guard's activation, by Proclamation of April 29, was also "to meet disorders or threatened disorders on the campuses of Ohio State University and campuses of other state-assisted Universities."

The pleadings would give the impression that the Ohio National Guard was on the Kent State campus for no reason whatever. It is asserted that the Governor's orders "obviously do not" have any relationship to the conditions prevailing on the Kent State campus. Thus, the pleaders would leave it that the Guard had no reason for being at Kent; that the Governor of Ohio with his soldiers entered upon the peace and quiet of Kent State campus as invaders, bent on killing innocent girls and boys.

It is charged that we — the majority — ignore the "wrongful death actions which are joined with the Section 1983 claims" because we fail to consider the complaint's allegations charging the Governor with "willful and wanton" killing of innocent young people. This writer does not hesitate to label such pleadings obvious contrivances to get into court without pretense of fair averment of causes of action.

The complaints, with transparent purpose, omit any mention of what had taken place in the City of Kent and on the campus of Kent State University. These are some of the allegations:

"At all times herein mentioned all defendants *acted and conspired* under color of statutes, ordinances, regulations,

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 29

customs and usages of the State of Ohio." (Emphasis supplied.)

"Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

(a) *Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place;*" (Emphasis supplied.)

"Suddenly and without warning and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, *intentionally, willfully, wantonly and maliciously* disregarding the lives and safety of students, spectators, passers-by * * * including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, * * *." (Emphasis supplied.)

"All acts herein mentioned *were done individually and in conspiracy* by these defendants and by other unknown persons with *the specific intent of depriving plaintiff and plaintiff's decedent of their rights* to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio." (Emphasis supplied.)

The pleaders then go on to ask One Million Dollars compensatory damages and Five Million Dollars punitive damage. In another of the complaints, the pleaders ask Two Million Dollars compensatory and Two Million Dollars punitive damages.

We search in vain for anything in the several plaintiffs' pleadings to tell us what reason, pretentious or otherwise, caused the defendant President of Kent State and the Mayor of the City of Kent to ask the Governor of Ohio to order the Ohio National Guard to the scene of the tragedies we deal with here. A fair reading of plaintiffs' pleadings dis-

30 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

closes an attempt to aver that, without any precedent events or causes, the Governor of Ohio *willfully and wantonly* ordered a company of the Ohio National Guard onto the Kent State campus, whose officers and men then *proceeded deliberately and without cause to kill the several plaintiffs' decedents*. The dissembling in plaintiffs' pleadings in this regard is portrayed by this Court's opinion in *Morgan v. Rhodes*, 456 F.2d 608. Such suit involved the events of April and May, 1970, on the campus of Kent State.

"At the outset, this complaint concedes that there was disorder which had not been terminated by normal civilian controls and that such disorders were continuing as of the time the Governor called out the troops. The complaint says:

'10. On or about May 1, 1970, there occurred certain disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus.'" 456 F.2d at p. 610.

I believe also that what had been going on at Kent State and its environs preceding the tragic deaths of these young people is so widely and publicly known across the nation that this Court may take judicial notice of such events. 8 Cyc. Fed. Proc. § 26.226 (3rd ed. 1968). The pleadings make no mention of the burning down of the ROTC Building on the campus of the University and the continued threats to persons and property — all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal. None of these things are even alluded to in the pleadings. For the Governor of Ohio to have refused to send the National Guard to the scene of these events and for the Guard and its men to have refused to deal with the situation confronting them, would have been dereliction of duty.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 31

The pleadings presented to the District Judge were clearly contrived to hide rather than disclose the true background of the involved events — an attempt to predicate causes of action without disclosing their true subject matter. All of the foregoing confirms my belief that the pleadings do not disclose causes of action under Section 1983, and that this is not a case in which to fashion new rules to strike down traditional immunities.

32 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

CELEBREZZE, Circuit Judge, dissenting. With due respect for my Brothers of the majority, I am unable to concur in their opinion or the result reached thereunder.

The majority concludes that the present suits are "in substance and effect actions against the State of Ohio" within the prohibition of the Eleventh Amendment. As discussed in Part II of this dissent, however, I find no authority to support such an extension of the Amendment, nor do I understand the majority's disregard for the Supreme Court's ruling in *Ex parte Young*, 209 U.S. 123 (1908). Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. § 1983, with its requirement that defendants thereunder be shown to have acted under color of state law.

The majority concludes that the present suits are also barred by the common law doctrine of executive immunity. The majority is totally oblivious to the fact, as discussed in Part III of this dissent, that this conclusion in effect constitutes judicial repeal of an act of Congress in deference to a common law rule which emerged after the enactment of Section 1983.

The majority reads *Moyer v. Peabody*, 212 U.S. 78 (1909), as giving a governor and National Guardsmen total immunity from any form of judicial review of their actions. As discussed in Part IV of this dissent, the majority thus ignores not only the good faith requirement which was established by stipulation in the *Moyer* decision, but also the holding of *Sterling v. Constantin*, 287 U.S. 378 (1932), that the courts can and must review allegations that the actions of a governor and National Guardsmen have exceeded the range of permitted, discretionary conduct justified by the exigencies of the situation.

The majority totally ignores the wrongful death actions which are joined with the Section 1983 claims in each of the complaints. As discussed in Part V of this dissent, the wrongful death actions in the *Krause* and *Miller* complaints are asserted under original, diversity jurisdiction — rather than

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 33

pendent jurisdiction, to which the majority makes a passing reference — requiring that these actions be disposed of under the applicable Ohio common law and statutes. While it quotes one of these statutes, O.R.C. § 5823.27, in full, the majority fails to consider the fact that the present complaints specifically allege willful and wanton misconduct within the exception to the immunity granted under that statute.

Apart from these aspects of the majority opinion which I will discuss at some length in the remaining portions of this dissent, the majority has failed to recognize the status of these suits and the precedential effects of their ill-advised pronouncements. These suits were dismissed for lack of jurisdiction without an answer to the complaints and without any evidence having been introduced by either party — save two proclamations issued by Defendant-Appellee Governor Rhodes, the first of which orders Ohio National Guardsmen to active duty to protect against violence arising from a wild-cat strike in the truck transportation industry and the second of which was issued one day after the date of the deaths for which recovery is sought in the present suits. Even if these proclamations served as evidence of the conditions which prevailed on the Kent State Campus when the deaths occurred — which they obviously do not — they could not stand as conclusive proof of necessity in view of the Supreme Court's discussion in *Sterling v. Constantin*, 287 U.S. 378, 402-03 (1932). The majority opinion is nonetheless framed under the assumption that the violence and riotous conditions which, according to the media, may have prevailed on the Kent State Campus, have been established as proven facts for purposes of the present suits.

The shallowness of the majority's reasoning is illustrated in part by their reliance on this Court's decisions in *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971), and *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), *cert. granted sub nom., Gilligan v. Morgan*, No. 71-1553, 41 U.S.L.W. 3221 (U.S. Oct. 24, 1972) (in which I dissented because no injunctive relief or de-

34 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

claratory judgment could have been granted), undaunted by the fact that those suits were against defendants comparable to those named in the present cases yet jurisdiction over the *Bright* and *Morgan* suits was in no way precluded by either the Eleventh Amendment or the common law doctrine of executive immunity.

No less than my Brothers of the majority, I recognize the considerations which weigh against judicial review of the conduct of state officials and National Guardsmen in the face of civil disorders and sudden emergencies — when the latter conditions are proven. Unlike the majority, I believe that these considerations can be given appropriate weight without totally barring judicial review of possibly unwarranted deprivations of constitutional rights — particularly when the majority can sustain its position only by resorting to an unsupportable extension of the Eleventh Amendment and an impermissible application of the common law doctrine of executive immunity. As discussed in Part IV of this dissent, the Supreme Court's opinion in *Sterling v. Constantin*, 287 U.S. 378 (1932), establishes workable guidelines for judicial review in this area which neither permit the courts to substitute their retrospective judgment for that of state officials acting in good faith in the face of an emergency nor require that the courts totally close their doors to claimed deprivations of constitutional rights when it is asserted that state action exceeded the limits of discretionary conduct justified under the circumstances.

I believe that the errors of the majority become self-evident from the following review of the suits and discussion of the issues raised by the rulings of the District Court and the majority opinion herein.

I.

These are appeals from the District Court's dismissal of three suits for damages under 42 U.S.C. § 1983. Each of the complaints also asserts a state law claim for wrongful death. Because the appeals involve the same questions of law, they

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 35

were heard as companion cases under Rule 7(b) of this Court.

The suits were brought by the representatives of the estates of Allison Krause, Jeffrey Glenn Miller, and Sandra Lee Scheuer, who died as a result of gunshot wounds allegedly inflicted by members of the Ohio National Guard on the Kent State University Campus on May 4, 1970. The complaints, which were filed separately during the months of July through September, 1970, each named James Rhodes, Governor of the State of Ohio, Sylvester Del Corso, Adjutant General of the Ohio National Guard, and Robert Canterbury, Assistant Adjutant General of the Ohio National Guard, as defendants. The Miller and Scheuer complaints also named as defendants Harry D. Jones, a major in the Ohio National Guard, John E. Martin and Raymond J. Srp., captains in the Ohio National Guard, various unnamed officers and enlisted men of the Ohio National Guard, and Robert White, President of Kent State University. The Miller complaint alone named Alexander Stevenson, a member of the Ohio National Guard, as an additional defendant.

The complaints assert that the decedents, Allison Krause, Jeffrey Glenn Miller, and Sandra Lee Scheuer, were enrolled as students at Kent State University in May 1970 and that none of the decedents was engaged in any riotous, violent, or provocative conduct at the time the fatal wounds were inflicted on May 4, 1970.

Although the defendants named in the three complaints are not identical and the allegations contained in the complaints vary somewhat as to the specific conduct challenged, those allegations can be generally summarized as follows: (1) Governor Rhodes intentionally, willfully, wantonly and recklessly ordered Ohio National Guard troops to duty on the Kent State campus when such action was unnecessary; permitted the troops to carry loaded weapons, thus increasing the risk that innocent persons would be injured and killed; permitted the troops to shoot at persons without justification;

36 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

and ordered the troops to break up all assemblies, whether lawful or unlawful; (2) Adjutant General Del Corso and Assistant Adjutant General Canterbury intentionally, willfully, wantonly and recklessly caused and ordered inadequately trained and incapable Ohio National Guard troops to carry loaded weapons, thus increasing the risk of shooting innocent persons; to shoot at persons without legal justification; and to engage in actions which increased the risk of injury and death to persons on and near the Kent State campus; (3) Major Jones and Captains Martin and Srp intentionally, willfully, wantonly and recklessly caused and ordered Ohio National Guard troops to shoot at and in the direction of persons without legal justification and to engage in actions which increased the risk of injury and death to persons on or near the Kent State campus; or, alternatively, these defendants intentionally, willfully, wantonly and recklessly failed to restrain the troops under their command from shooting and causing others to shoot, without legal justification, at and in the direction of persons on and near the Kent State campus; (4) the unnamed Ohio National Guard members willfully, wantonly and recklessly shot at and in the direction of persons on the Kent State campus without legal justification and caused others to do so; or, alternatively, if these unnamed Guardsmen were ordered to shoot their weapons, such orders were patently unlawful and did not legally justify such shooting; (5) President White intentionally, willfully, wantonly and recklessly failed to take any actions to control the Ohio National Guard activities on the Kent State campus or to decrease the risk of injury and death when such actions could have decreased that risk.

It is further asserted that the conduct of the Defendants-Appellees, as set forth above, was undertaken individually and in concert under color of state law, in deprivation of the decedents' rights to due process and equal protection, and that Plaintiffs-Appellants are therefore entitled to compensatory and punitive damages under 42 U.S.C. § 1983. The same conduct of Defendants-Appellees is asserted as the basis for

compensatory and punitive damages under the state wrongful death claims.

In a single Memorandum and Order, the District Court granted Defendants-Appellees' motions to dismiss the three suits under Rule 12(b)(1), F.R.C.P., for lack of subject matter jurisdiction. The District Court made the following findings and conclusions in support of its dismissal:

"The Eleventh Amendment to the United States Constitution prohibits this court from exercising jurisdiction in this case and this court so finds.

"All defendants, including President White, are sued in their official capacities and sovereign immunity so extends."

II.

The federal claim in each of the three complaints is asserted under 42 U.S.C. § 1983, which provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

Acknowledging that the complaints asserted claims against the individual defendants under Section 1983, the District Court nonetheless ruled that because each of the several defendants was being sued in his representative capacity as a public or military official and/or an agent of the sovereign State of Ohio, the suits were "essentially against the State of Ohio." The State of Ohio having failed to consent to such actions against it, the District Court concluded that the suits are barred by the Eleventh Amendment. This conclusion and the majority's endorsement of it are in direct conflict with the applicable case law.

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court was faced with contentions, similar to those of Defendants-Appellees here, that a suit in federal court against a state official was in essence a suit against the state, which was barred by the Eleventh Amendment. There a federal Circuit Court had enjoined the Attorney General of the State of Minnesota from instituting any action or proceeding to compel obedience to, or compliance with, a Minnesota statute or to enforce the remedies and penalties thereunder, pending the Court's ruling on the constitutionality of the statute. The Supreme Court ruled that the Eleventh Amendment did not bar the Circuit Court's injunction against the state attorney general, notwithstanding the fact that he was sued in his capacity as a state official:

"If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U.S. at 159-60.

Through its decision in *Ex parte Young*, the Supreme Court resolved what might otherwise have stood as a conflict between the Eleventh Amendment and suits in a federal court by citizens seeking to vindicate their rights under the Fourteenth Amendment. As was recently noted by Mr. Justice Brennan, the *Young* decision — coupled with what are now 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3), 1331 — firmly established the federal courts as the primary guardians against state interference with constitutional rights:

"*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh

Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between [*Osborn v. United States Bank*, 9 Wheat. 738 (1824)] and *Young*, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights The principal foundations of the expanded federal jurisdiction in constitutional cases where the Civil Rights Act of 1871, 17 Stat. 13, which in § 1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state statute, ordinance, regulation, custom, or usage, see 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), and the Judiciary Act of 1875, 18 Stat. 470, which gave lower federal courts general federal-question jurisdiction, see 28 U.S.C. § 1331. These two statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court." *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971) (Brennan, J., concurring in part, dissenting in part).

The District Court's determination that the present suits under Section 1983 are barred by the Eleventh Amendment cannot be upheld in the face of the Supreme Court's decision in *Ex parte Young*. No less than the suits for injunctive relief which were before the Circuit Court in *Young*, the present actions under Section 1983 seek redress of asserted infringements of constitutional rights by state officials. To hold that the present suits against state officials under Section 1983 are barred by the Eleventh Amendment would in effect overrule the Supreme Court's holding in *Ex parte Young* and destroy Section 1983 as a tool by which federal courts are to guard against state interference with constitutional rights.

In its opinion in *Ex Parte Young*, *supra*, 209 U.S. at 150-52 the Supreme Court reviewed the scope of the Eleventh Amendment as it had then been construed. Clearly a citizen's suit

in which a state is a named party cannot be entertained by a federal court. See *Osborn v. United States Bank*, 9 Wheat. 738, 846, 857 (1824). Nor may a federal court hear a suit by a citizen against a governor or other state officer, in his official capacity, for moneys in the state treasury, *Governor of Georgia v. Madrazo*, 1 Pet. 110, 122, 123 (1828). And a citizen's suit against state officials, where the relief sought would require the state's specific performance of a contract, is likewise barred by the Eleventh Amendment in the absence of the state's consent. *Hagood v. Southern*, 117 U.S. 52, 67 (1886); *In re Ayers*, 123 U.S. 443 (1887).

The cases relied upon by the District Court in support of its conclusion that the present suits are barred by the Eleventh Amendment clearly fall within the above categories. The District Court based its ruling on the following cases: *Missouri v. Fiske*, 290 U.S. 18 (1933) (ancillary and supplemental bill seeking an injunction against a state, in its own name, restraining it from prosecuting proceedings in a state court); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) (suit against a state agency for the refund of taxes from the state treasury); *Great Northern Ins. Co. v. Read*, 322 U.S. 47 (1944) (suit against a state insurance commissioner to recover taxes from the state treasury); *Louisiana v. Jumel*, 107 U.S. 711 (1882) (suit against state officials to require specific performance of contracts with the state and appropriation of state treasury funds); *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964) (FELA suit against a state agency for damages to be paid from the state treasury; state's operation of an interstate railway constituted consent to such a suit.)¹ Likewise, *Ex parte New York*, 256 U.S. 490 (1921) — the only Eleventh Amendment case cited as support for

¹ The District Court also cited *Fitts v. McGhee*, 172 U.S. 516 (1899), in support of its application of the Eleventh Amendment. As noted by the Supreme Court in *Ex parte Young*, *supra*, 209 U.S. at 156-57, however, the *Fitts* decision rested upon the plaintiff's invalid attempt to test the constitutionality of a state statute by naming as defendants state officials who had no power to enforce the statute in question.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 41

the majority's holding — involved an attempt to join the New York Superintendent of Public Works as a defendant in three admiralty suits, under which any judgment would be satisfied out of the property or treasury of the State.

In several of these cases the Supreme Court expressly acknowledged that it was *not* faced with a suit against a state official under his personal liability for his wrongful acts:

"The ancillary and supplemental bill is brought by the respondents directly against the State of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment. That principle is that the exemption of States from suit does not protect their officers from personal liability to those whose rights they have wrongfully invaded." *Missouri v. Fiske, supra*, 290 U.S. at 26.

"In such cases [where relief is sought under general law from the wrongful acts of officials] the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally." *Great Northern Insurance Co. v. Read, supra*, 322 U.S. at 51.

"Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally." *Ford Motor Co. v. Department of Treasury of Indiana, supra*, 323 U.S. at 462.

The present actions under Section 1983 are not against the State of Ohio as a named defendant; they do not seek money damages from the State's treasury; nor would the requested relief, if granted, require specific performance of a contract by the State. Rather, these actions are brought against the named defendants, as individuals, under their personal liability for conduct which allegedly deprived Plaintiffs-Appellants' decedents of their constitutional rights. The suits are

of the type which the Supreme Court was careful to exclude from the Eleventh Amendment's prohibition in the cases discussed above and in its landmark decision in *Ex parte Young*.

Summarily dismissing the Supreme Court's decision in *Ex parte Young* as "inapposite" and ignoring the scope ascribed to the Eleventh Amendment by the above cases, the majority holds that the "nature and effect" of the present suits bring them within that Amendment's prohibition. The majority fails to consider that a comparable "nature and effect" is a prerequisite for any suit under Section 1983, with its requirement that defendants thereunder be shown to have acted under color of state law. Any question of Section 1983's constitutionality which thus emerges from the majority's approach, is averted by the fact that Section 1983 provides for redress against persons under their personal liability, and suits thereunder are theretofore not within the established scope of the Eleventh Amendment. See *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971).

III.

The District Court apparently based its dismissal of these suits solely on their asserted conflict with the Eleventh Amendment. Several of the cases cited by the District Court, however, dealt with the personal immunity of public officials rather than the Eleventh Amendment or sovereign immunity. Whereas the District Court may thus have merely confused the concepts of personal immunity and sovereign immunity as the latter is incorporated in the Eleventh Amendment, the majority expressly holds that the present suits are barred not only by the Eleventh Amendment but also by the common law doctrine of executive immunity.

Section 1983 contains no provision which can be construed as establishing immunity for any defendants thereunder.²

² The question of whether common law immunities are applicable to suits under Section 1983 is, of course, governed by federal or

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 43

As was observed by the Court of Appeals for the Second Circuit in *Jobson v. Henne*, 355 F.2d 129, 133 (2d Cir. 1966):

"The Civil Rights Acts in general, and § 1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar."

Reflecting upon the common law immunities which were firmly established prior to the enactment of Section 1983, however, the Supreme Court has imparted immunity to two specific classes of public officials who might otherwise be liable under this statute for their official acts. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court held that "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings," with its "taproots in the parliamentary struggles of the Sixteenth and Seventeenth Centuries," was not abridged by the Civil Rights Act of 1871. 341 U.S. at 372. Therefore, members of a senate committee of the California Legislature were held to be immune from suit under 8 U.S.C. §§ 43 and 47(3) [now 42 U.S.C. §§ 1983 and 1985(3)]. And in *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that Section 1983 did not abrogate the well established common law doctrine of "immunity of judges from liability for damages for acts committed within their judicial jurisdiction." 386 U.S. at 554.

Beyond the immunity for legislators and judges which the Supreme Court has expressly recognized under Section 1983, there exists no authority for lower federal courts to further restrict the statute by applying common law notions of executive immunity to suits brought thereunder. The common law

general common law rather than state law. *Nelson v. Knorr*, 256 F.2d 312, 314 (6th Cir. 1958). In contrast to Part V of this dissent, which deals with the state law wrongful death actions, the present discussion does not require that we look to the common law and statutory immunities which Ohio might afford to Defendants-Appellees.

doctrine of executive immunity is at odds with the purpose or, more accurately, the very existence of Section 1983 as a remedy against deprivations of constitutional rights. In holding that the doctrines of legislative and judicial immunity are applicable to suits under Section 1983, the Supreme Court emphasized that these common law doctrines were firmly established in England and this country when Congress enacted the Civil Rights Act of 1871. The Supreme Court therefore reasoned that Congress would not have intended to abrogate these immunities under Section 1983 without expressly so providing:

"We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Tenney v. Brandhove*, *supra*, 341 U.S. at 376.

"The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray*, 386 U.S. at 554-55.

The doctrine of executive immunity is not so well established, having been recognized in neither England nor this Country until some 20 years after the enactment of Section 1983. See *Barr v. Matteo*, 360 U.S. 564, 581-82 (1959) (Warren, C.J., dissenting). It therefore cannot be assumed that Congress intended this doctrine to apply to suits under Section 1983.

Another compelling reason for not applying a doctrine of executive immunity in suits under Section 1983 lies in the simple fact that such a doctrine, if added to the legislative and judicial immunity presently recognized under the statute, would totally circumscribe the remedy provided in Section 1983. It is difficult to envision what, if any, remedy would remain under Section 1983 if, in addition to those persons who

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 45

can bring themselves under legislative or judicial immunity, the broad class of persons who might be characterized as state executive officials is also immune from suit under the statute. Whereas Congress may have intended that the doctrines of legislative and judicial immunity would apply to suits under Section 1983, I assume that Congress did not intend that the remedy under the statute would be so thoroughly frustrated, or in effect nullified, by the additional common law doctrine of executive immunity. The rule that statutes in derogation of the common law must be narrowly construed certainly does not require, nor authorize, courts to apply a common law doctrine which totally undercuts the statute — particularly when that common law doctrine was not yet recognized when the statute was enacted.

The majority relies on the case of *Martone v. McKeithen*, 413 F.2d 1373 (5th Cir. 1969), and the cases cited therein, in support of its conclusion that the present suits are barred by the doctrine of executive immunity. In *Martone* the Court of Appeals held that the Governor of Louisiana was immune from a damage suit³ under Section 1983 for acts within the sphere of his executive activity. By substituting "the immunity of public officers from suit" within the following discussion

³ Significantly, the *Martone* Court remanded the case for further proceedings on the appellant's claim for injunctive relief against all defendants. That Court was thus of the view that the immunities which it broadly applied barred only suits for damages under Section 1983. In *Nelson v. Knox*, 256 F.2d 312, 314-15 (6th Cir. 1956), this Court expressly rejected such a dichotomy between injunctive relief and damages with respect to immunity under Section 1983:

"To be sure, the present action is one for money damages rather than an injunction, but that difference does not affect the question of immunity. Indeed, the Supreme Court has pointed out that under the Civil Rights Act relief in equity should sometimes be withheld even where 'comparable facts would create a cause of action for damages.' *Stefanelli v. Minard*, 1951, 342 U.S. 117, at page 122, 72 S.Ct. 118, 121, 96 L.Ed. 138; see *Williams v. Dalton*, 6 Cir., 1956, 231 F.2d 646, 649; *Cobb v. City of Malden*, 1 Cir., 1953, 202 F.2d 701, 704-705." 256 F.2d at 314-15.

Compare *Giles v. Harris*, 189 U.S. 475 (1903), with *Lane v. Wilson*, 307 U.S. 268 (1939). Cf. *Sterling v. Constantin*, 287 U.S. 378, 403 (1932).

of judicial immunity in *Pierson v. Ray*, 386 U.S. at 554, the *Martone* court cited that decision as support for applying a broad rule of official immunity under Section 1983:

"We do not believe that this settled principle of [the immunity of public officers from suit] was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.'" 413 F.2d at 1375.

As discussed above, such a distorted reading of *Pierson v. Ray* would result in a wholesale abolition of the remedy prescribed under Section 1983.

In support of its holding that the Governor was immune from a damage suit under Section 1983, the *Martone* Court cited *Barr v. Matteo*, 360 U.S. 564 (1959), *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), and *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964) — cases upon which the majority herein similarly relies in support of their conclusion that Defendants-Appellees are clothed with executive immunity.

In *Barr v. Matteo*, the Supreme Court held that the Acting Director of the Office of Rent Stabilization was protected by an absolute immunity from a civil action for libel arising from his issuance of an official press release. The suit was not brought under Section 1983, no deprivation of constitutional rights was asserted, nor was the defendant a person acting under color of state law. The decision therefore cannot be said to support the application of a doctrine of executive immunity in suits against state officials under Section 1983.

Gregoire v. Biddle involved a damage suit under what are now Sections 1983 and 1985, 42 U.S.C., as well as common law, against federal officials for false arrest. Holding that all defendants had absolute immunity, the District Court had dismissed the suit. The Court of Appeals affirmed the dismissal of the Section 1983 claim because none of the defen-

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 47

dants had acted "under color of" state law — not because absolute immunity was applicable to suits under the statute.⁴ 177 F.2d at 581-82. Moreover, the Court of Appeals' broad language upholding the absolute immunity of the federal defendants under the common law claims has been modified by the recent ruling in *Bivens v. Six Unknown Named Agents of the F.B.I.*, 456 F.2d 1339 (2d Cir. 1972), wherein the same Court held that F.B.I. agents were not immune from damage suits for their allegedly unreasonable search and arrest without probable cause.

In *Norton v. McShane* the plaintiffs similarly sought damages under 42 U.S.C. §§ 1983 and 1985(3) and common law from certain federal officials, including a deputy United States Marshal and his supervisors for their allegedly unlawful arrests. Applying the absolute immunity of federal officials acting within the scope of their authority, as prescribed in *Barr v. Matteo* and *Gregoire v. Biddle*, *supra*, the Court of Appeals affirmed the lower Court's dismissal of the common law actions. As in *Gregoire v. Biddle*, however, the dismissal of the action under Section 1983 was affirmed because none of the defendants had acted "under color of" state law. The question of official or executive immunity under Section 1983 therefore was not before the Court. The Court did suggest in dictum, however, that the doctrine of official immunity "may be given more limited application in those suits [under Section 1983] than it has been given at common law." 332 F.2d at 861.

Thus, none of the decisions cited by the Court in *Martone v. McKeithen* and relied on by the majority herein ruled upon the applicability of official or executive immunity to suits under Section 1983. Indeed, the same Court's opinion in *Norton v. McShane*, *supra*, recognized in dictum that the doctrine of official immunity, as applied at common law, may be given more limited application in suits under Section 1983. 332 F.2d at 861.

⁴ The *Gregoire* Court did allude to *Pickering v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3d Cir. 1945), holding that absolute official immunity

Moreover, the Court of Appeals for the Fifth Circuit (which rendered both the *Martone* and *Norton* decisions, *supra*) has recently ruled in *Roberts v. Williams*, 456 F.2d 819 (5th Cir.) *cert. denied*, 404 U.S. 866 (1971), that the absolute immunity which has been afforded to federal and state officials under common law is not applicable in suits against state officials under Section 1983. 456 F.2d at 830-31. There a 14-year old inmate of a Mississippi county prison farm sued the superintendent of the farm and the individual members of the county board of supervisors under Section 1983 and common law, seeking damages for a shotgun wound inflicted by a "patently incompetent" trusty guard at the farm. The District Court had dismissed the complaint with respect to the members of the board of supervisors, holding that they were immune from suit under both the Section 1983 and common law claims.⁵ While it affirmed the District Court's determination that the board members were immune from the common law actions, the Court of Appeals rejected the application of common law immunity to the claim under Section 1983. Significantly, the *Roberts* Court acknowledged that absolute common law immunity has been recognized for federal officials [citing *Barr v. Matteo* and *Norton v. McShane*, *supra*], but it ruled that such immunity cannot operate to bar suits against state and local officials (other than judges and legislators) under Section 1983.⁶ *Id.* See also *Alexander v. Nossner*, 438

does not apply to actions under Section 1983, but found it unnecessary to consider this point. 177 F.2d at 581-82.

⁵ The District Court had found the superintendent of the county farm liable in damages under both Section 1983 and state common law. 302 F.Supp. 972 (N.D. Miss. 1969). On appeal, the superintendent simply challenged the sufficiency of the evidence to support this judgment, and he did not assert that either action was barred by his official immunity. The Court of Appeals affirmed the judgment against him under both the federal and common law claims.

⁶ The Court of Appeals did ultimately affirm the dismissal of the Section 1983 action against the board members because no breach of duty or nonfeasance on their part had a causal relation to the plaintiff's injuries — but not because the board members were immune from suit.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 49

F.2d 183, 200-02 (5th Cir. 1971), *modified on other grounds*, 456 F.2d 835 (en banc) (police chief, fire chief, and prison warden had no common law official immunity under Section 1983); *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971) *cert. granted sub nom. District of Columbia v. Carter*, 404 U.S. 1014 (1972) (rejecting common law official immunity as a bar to suits under Section 1983 against a police captain and a police chief); *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1971) (superintendent of schools and elected members of school board were not protected by common law, official immunity in a damage suit under Section 1983); *Sostre v. McGinnis*, 442 F.2d 178, 205 n.51 (2d Cir. 1971) (state administrative officials were not entitled to immunity from damage judgment which has been extended to judges and legislators under Section 1983).

I likewise conclude that the common law doctrines of executive and official immunity, as recognized in *Barr v. Matteo* and *Gregoire v. Biddle*, *supra*, are inapplicable in suits against state officials under Section 1983. This is the only result which averts judicial repeal of the remedy which Congress has expressly provided under that statute — a statutory remedy which the *Barr v. Matteo* and *Gregoire v. Biddle* courts did not have to consider when they gave recognition to their respective rules of common law, personal immunity.

In reaching this conclusion I am not unmindful of the policy considerations which support the recognition of a general rule of official immunity outside the context of suits under Section 1983. This policy was set forth by Judge Learned Hand in *Gregoire v. Biddle*, *supra*, 177 F.2d at 581, discussing the absolute immunity of federal officials:⁷

"The justification for [granting absolute immunity to federal executives] is that it is impossible to know whether

⁷ But see *Bivens v. Six Unknown Named Agents of the F.B.I.*, 456 F.2d 1339 (2d Cir. 1972) where the same Court of Appeals refused to recognize the immunity of F.B.I. agents from damage suits for their allegedly unreasonable search and unlawful arrest.

the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." 177 F.2d at 581.

See also *Barr v. Matteo*, *supra*, 360 U.S. at 571; *Norton v. McShane*, *supra*, 332 F.2d at 857-59.

However compelling such considerations may be in the context of common law suits against federal or state officials, they cannot override the remedy against state officials which Congress has expressly provided in Section 1983. That statute is one of the tools with which Congress chose to make federal courts the primary guardians against state interference with constitutional rights. See *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971) (Brennan, J., concurring in part, dissenting in part). I find no countervailing legislation through which Congress — by adopting court-made rules of personal immunity — has chosen to protect state officials from burdensome suits or to insure their freedom from inhibitions in executing their official duties.

Moreover, the policy considerations set forth in *Gregoire v. Biddle*, as quoted above, relate to the need to protect public officials from the full gamut of common law suits to which they might otherwise be exposed. Indeed, the Supreme Court's broad pronouncements regarding executive immunity in *Barr v. Matteo*, *supra*, were rendered in the context of a simple libel suit against the defendant in that case. In contrast to the wide range of common law suits which public officials might face in the absence of broad common law immunities, Section 1983 exposes state officials to a relatively restricted class of suits — actions to redress deprivations of constitutional rights.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 51

In this context, the policies supporting the doctrines of official or executive immunity are less persuasive. The burden upon state officials to defend against these suits — the non-meritorious as well as the meritorious — is but a small price to pay for the protection of constitutional rights. And it is a fundamental precept of this Nation that public officials should exercise the highest degree of care in discharging their duties when the constitutional rights of citizens are at stake. Moreover, it certainly cannot be said that Congress was ignorant of the burden it was placing upon state officials when it established a remedy to protect against state interference with the constitutional rights of citizens.

Nor can it be said that the conduct of a state official in discharging his discretionary duties is of such a nature that judicial review of the constitutionality of that conduct must be barred. Nowhere in the Constitution do I find that the rights guaranteed therein are to be subordinate to the need for unhampered exercise of discretion by state officials. As real as this need may be, it is not so absolute that suits under Section 1983 to redress asserted deprivations of constitutional rights by state officials must be barred in deference to it. Rather than immunizing state officials from suit under Section 1983, the discretionary nature of their conduct should relate only to the question of ultimate liability under that statute for actions which were unreasonable under the circumstances.⁸

In this respect I recognize that the actions challenged in the present complaints — to the extent that any of those actions might be shown to have been directly related to the quelling of a civil disturbance — demand the utmost in discretion

⁸ Judge Bazelon of the District of Columbia Circuit has emphasized this point in questioning the need for various doctrines of immunity in the context of common law suits. He suggests that the degree of discretion required in the performance of official duties should bear solely on the question of ultimate liability, and need not be raised as a bar to the suit. The substantive law of torts, rather than broad rules of immunity, can adequately protect public officials from liability for conduct which was reasonable under the circumstances. *Carter v. Carlson*, *supra*, 447 F.2d at 364, n.15.

52 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

and immediate judgments in the face of sudden exigencies. As discussed in Part IV of this dissent, in *Moyer v. Peabody*, 212 U.S. 78 (1909), and *Sterling v. Constantin*, 287 U.S. 378 (1932), the Supreme Court has expressly provided state officials with a permitted range of discretionary conduct in the face of civil disorders and, as to actions within that permitted range, has restricted judicial review to the narrow question of whether the state officials acted in good faith and in the honest belief that their actions were necessary to quell the disturbance. Beyond this restriction on judicial review of acts within a permitted range of discretion, neither *Moyer v. Peabody* nor *Sterling v. Constantin* established any broad rule of personal immunity for state officials acting to quell civil disorders. Such a rule of personal immunity, unrelated to whether the challenged conduct was within the range of actions justified by the circumstances, would render meaningless the language in *Sterling v. Constantin* respecting a permitted range of justifiable conduct and would directly contravene the established rule set forth in that opinion:

"What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case, are judicial questions. . . . There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 401.

I would therefore hold that the present suits under Section 1983 are not barred by any notions of common law executive immunity. The majority's conclusion to the contrary renders Section 1983 a nullity and recognizes the state's interest in the immunity of its officials as being superior to the constitutional rights of individuals.

IV.

The majority herein — as did the District Court — relies in part on the Supreme Court's decision in *Moyer v. Peabody*, 212 U.S. 78 (1909), for the proposition that Defendants-Appellees' good faith actions in the face of a civil disorder are beyond judicial review. In that case, the Governor of Colorado had declared a county to be in a state of insurrection — presumably because of existing labor unrest and apprehension of trouble from members of the Western Federation of Miners, of which Moyer was president. Apparently by order of the Governor, members of the State's National Guard arrested Moyer and imprisoned him for a period of two and one-half months, during which time no charges were filed against him and no attempt was made to bring him before the state courts, which were in full operation during the incident.

After his release from custody, Moyer brought an action for damages against the Governor (then out of office) under R.S. § 1979 (now 42 U.S.C. § 1983), alleging that the arrest and incarceration were without probable cause, in violation of Moyer's Fourteenth Amendment rights. The Circuit Court dismissed the complaint for lack of jurisdiction.

The Supreme Court affirmed the dismissal on the ground that the complaint failed to state a claim under R.S. § 1979.

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." 212 U.S. at 85.

Even if it could be said that this subjective good faith test prescribed in the *Moyer* decision sets the limits for judicial review in the present cases, that test would not support the District Court's dismissal of the present complaints. Moyer at no time asserted that the Governor's conduct was in bad faith

54 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

or that it was not directed toward the quelling of an insurrection. Rather, the parties agreed that the arrest and detention were undertaken in good faith in the face of an actual insurrection: "The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him." 212 U.S. at 84.⁹

The present complaints do not stipulate that the alleged conduct of the defendants was undertaken in good faith or that it was directed at the quelling of an actual insurrection or disorder. To the contrary, the complaints assert that the action or inaction of all defendants was intentional, willful, wanton, reckless, and unjustified under the circumstances. Because the suits were dismissed on the complaints for lack of jurisdiction, no evidence was introduced to support or refute these allegations. Therefore, under the above-quoted language from the *Moyer* opinion alone, the present suits would have to be remanded for further proceedings in order to determine whether the alleged actions of the defendants, if proven, were undertaken in "good faith and in the honest belief" that they were necessary to head off an actual insurrection.

In view of the Supreme Court's subsequent decision in *Sterling v. Constantin*, 287 U.S. 378 (1932), however, it is clear that the "good faith and honest belief" test prescribed in *Moyer v. Peabody* cannot be broadly construed as a general standard of judicial review of the actions of a governor and National Guardsmen in the face of an insurrection or civil disorder. In *Sterling*, the Governor of Texas — under his

⁹ The parties in *Moyer v. Peabody* had agreed that the record of the proceedings on Moyer's earlier petition for a writ of habeas corpus in the Supreme Court of Colorado would be made part of the complaint before the federal Circuit Court. The existence of an insurrection and the Governor's good faith were established in this record and therefore were not at issue before the latter Court. 212 U.S. at 84.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 55

declaration of martial law — had ordered the state's National Guard to seize and control privately owned oil wells in order to impose production restrictions. Finding that the evidence did not support the Governor's and National Guard officials' asserted belief that their actions were necessary to prevent a threatened insurrection, a three-judge District Court permanently enjoined the Governor and National Guard officers from enforcing their executive and military orders and otherwise interfering with the production of oil.

In upholding the three-judge Court's injunction, the Supreme Court noted that the question before it did not relate to the "permissible scope of determinations of military necessity in all their conceivable applications to actual or threatened disorder and breaches of the peace," nor did it relate to the "quelling of disturbances and the overcoming of unlawful resistance to civil authority." 287 U.S. at 401. Nonetheless, it is clear from the precise language of the *Sterling* opinion that the "good faith and honest belief" test suggested by the *Moyer v. Peabody* decision cannot stand as a general limitation on judicial review in cases where the existence of actual civil disorder or insurrection is established.

At the outset the Supreme Court in *Sterling* struck down the notion that a governor or other state official, relying on his personal views of necessity,¹⁰ may create an irrebuttable presumption — unreviewable by the courts — that his actions

¹⁰ Prior to its entry of the permanent injunction against the Governor and National Guard officers, the three-judge District Court in *Sterling* had conducted a full evidentiary hearing on the merits of the plaintiffs' claims. The Governor and a National Guard General testified that their "orders had not been issued for the purpose of affecting prices, nor even per se to limit production, but 'as acts of military necessity to suppress actually threatened war' as they believed from reports brought to them that 'unless they kept the production of oil down to within 400,000 barrels, a warlike riot and insurrection, in fact a state of war, would ensue.' . . ." 287 U.S. at 391. The District Court, however, proceeded to make the following findings from the evidence before it: "We find no warrant in the evidence for such belief. Looking at it in the light most favorable to defendants' contention, it presents nothing more than threats of violence or breaches of the peace. . . . It shows that at no time has

56 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

and those of the National Guard were justified under the circumstances:

"And when the federal court, finding his action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise." 287 U.S. at 397-98.

At a later point in its opinion, the Supreme Court further assailed the defendants' assertion that their action under a

there been in fact any condition resembling a state of war, and that, unless the Governor may by proclamation create an irrebuttable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity." 287 U.S. at 391-92.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 57

proclamation of martial law "can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law":

"Appellants' contentions find their appropriate answer in what was said by this Court in *Ex parte Milligan*, 4 Wall. 2, 124, a statement as applicable to the military authority of the State in the case of insurrection as to the military authority of the Nation in time of war: 'The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.'" 287 U.S. at 402-03.

The *Sterling* Court then turned to consider the countervailing discretion which must be afforded to state officials under

58 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

their duty to suppress violence and maintain order.¹¹ Within this context, the Supreme Court discussed its earlier decision in *Moyer v. Peabody* and prescribed the limitations which must be placed on the language of that opinion:

"The nature of the power [of the Governor to call up the militia to suppress insurrection and disorder] also necessarily implies that there is a *permitted range of honest judgment as to the measures to be taken* in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer v. Peabody*, *supra*, the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor 'may kill persons who resist,' he 'may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.' In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant,

¹¹ As discussed in Part VI of this dissent, the *Sterling* Court expressly ruled that the Governor's decision to call up the National Guard is conclusive and, in and of itself, is not subject to judicial review. See 287 U.S. at 399.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 59

and the general language of the opinion must be taken in connection with the point actually decided. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Carroll v. Carroll's Lessee*, 16 How. 275, 287; *Myers v. United States*, 272 U. S. 52, 142.

"It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. 'But we are clearly of opinion,' said the Court speaking through Chief Justice Taney, 'that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.' Mitchell v. Harmony, 13 How. 115, 134. See, also, United States v. Russell, 13 Wall. 623, 628. There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 399-401 (emphasis added).

The foregoing discussion in *Sterling v. Constantin* clearly precludes the application of the "good faith and honest belief" language of *Moyer v. Peabody* as a general standard of judicial review in suits challenging the actions of a gover-

60 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

nor and National Guardsmen even when it is established from the evidence that those actions were directly related to the quelling of a civil disorder or insurrection. As set forth in the above-quoted portion of the *Sterling* opinion, the language of *Moyer v. Peabody* relates to judicial review of those actions of state officials only when it is established that those actions were within the "permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order" As such, the *Moyer* language is simply a statement of the deference which must be given to state officials' good faith judgments and actions within a permitted range of discretionary conduct.

It is equally clear from the *Sterling v. Constantin* opinion that in no case is the permitted range of honest judgment free from objective limitations. Rather, when presented with allegations that state officials, in their efforts to quell a disorder or insurrection, have deprived persons of their constitutional rights through actions which were not justified by the exigencies of the situation, the courts can and must ascertain "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case. . . . There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 401.

I thus find that the Supreme Court's decision in *Sterling v. Constantin* requires two levels of inquiry in suits to redress deprivations of constitutional rights by state officials whose actions are shown to have been directly related to the quelling of civil disorders or insurrections.¹² Initially the court¹³ must

¹² State officials are afforded a permitted range of good faith, discretionary measures only in the context of actions "in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance." *Sterling v. Constantin*, 287 U.S. at 400. As to any conduct which is not shown to have been directly related to the quelling of a disorder, liability under Section 1983 must be governed by general principles of tort liability. See *Monroe v. Pape*, 365 U.S. 187, 187 (1961).

¹³ For convenience, I refer to the trier of fact as the court throughout this discussion. Both levels of inquiry discussed in the text

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 61

review the circumstances surrounding any asserted deprivation of constitutional rights and determine if the conduct causing those asserted deprivations fell within the range of discretionary measures which were justified by the exigencies of the situation.

Precise standards, of course, cannot be prescribed as guides in defining the parameters of this range of discretion in any given case. Certainly the use of lethal force could seldom, if ever, fall within the range of permitted actions in the face of nothing more than a nonviolent sit-in or a peaceful protest march. At the other extreme, open violence and actual threats to human life would seemingly justify a broad range of discretionary actions, including the use of lethal force in some situations. Ultimately, "[e]very case must depend on its own circumstances." *Sterling v. Constantin*, 287 U.S. at 401.

If it is determined that the conduct of any state official was outside the range of justified actions, that official will be personally liable for any deprivations of rights resulting from his action, notwithstanding any asserted good faith or honest belief in the justification for his action. Alternatively, if it is determined that the conduct of any state officials was within the range of actions justified by the circumstances, under *Moyer v. Peabody* the second level of judicial review of that conduct must be restricted to the narrow question of the officials' "good faith and honest belief" that the actions were necessary to quell the disorder.

Personal liability will accompany any actions which, although adjudged to have been within the range of permitted conduct, are proven to have been undertaken in bad faith and/or without an honest belief that they were necessary to quell the disorder or prevent its continuance. This test,

relate to questions of fact which must be resolved by the trier of fact, be it the court or the jury working under appropriate instructions from the Court.

62 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

as prescribed in *Moyer v. Peabody*, is necessarily subjective, and the burden of proving the absence of good faith and an honest belief in necessity is therefore a difficult one in any case.

Beyond an inquiry into any allegations of bad faith and/or an absence of honest belief in necessity, a court cannot review any conduct which it has found to be within the range of actions justified under the circumstances. If the action taken was within the range of permitted measures, a court cannot review asserted errors in judgment nor consider whether a more prudent course of action might have been chosen. Rather, choices between alternative courses of action within the permitted range must be left solely to the discretion of the state officials. "[W]ithout such liberty to make immediate decisions, the power [of state officials to maintain peace] would be useless." *Sterling v. Constantin, supra*, 287 U.S. at 399-400.

I would remand the present Section 1983 suits for findings of fact respecting the nature of the alleged actions of Defendants-Appellees. As to any such actions which might be shown to have been directly related to the quelling of a civil disorder or insurrection, the trier of fact would be required to determine whether those actions fell within the permitted range of discretionary measures which were justified by the exigencies of the situation and whether those actions were undertaken in good faith and in the honest belief that they were necessary to quell the disorder.

V.

I now turn to consider the state law, wrongful death actions which, in addition to the claims under 42 U.S.C. § 1983, are asserted in each of the complaints.

Federal jurisdiction over the wrongful death actions in the *Krause* and *Miller* suits is based on diversity of citizenship,

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 63

28 U.S.C. § 1332.¹⁴ The Plaintiff-Appellant in the Scheuer suit, being a resident of Ohio, asserts her wrongful death action under the doctrine of pendent jurisdiction.

The District Court made no reference to the wrongful death actions, and the majority herein fails to discuss these actions, all three of which it erroneously characterizes as having been asserted under the doctrine of pendent jurisdiction. Although entertainment of the pendent claim in the Scheuer complaint rested upon the District Court's discretion in the interest of judicial economy, convenience, and fairness to the parties, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the wrongful death claims asserted in the Krause and Miller complaints were necessarily before the District Court under its original, diversity jurisdiction. It is therefore necessary to consider whether the wrongful death actions asserted in the Krause and Miller complaints are barred by the Eleventh Amendment and/or the common law doctrine of executive or personal immunity espoused by the majority herein.

I have concluded in Part II above that the claims under Section 1983 are not suits against the State of Ohio, so as to invoke the prohibition of the Eleventh Amendment. For purposes of the Eleventh Amendment's prohibition, the wrongful death actions are distinguishable from the Section 1983 claims only in that the former do not seek redress under a federal statute for an alleged deprivation of constitutional rights. Notwithstanding this distinction, the wrongful death actions are not suits against the State of Ohio so as to be barred by the Eleventh Amendment.

¹⁴ The Krause and Miller complaints state that the plaintiffs therein are residents of Pennsylvania and New York, respectively. The Krause complaint expressly invokes federal diversity jurisdiction over the wrongful death claims under 28 U.S.C. § 1332. While specifically referring only to jurisdiction under 28 U.S.C. §§ 1331 and 1343, the Miller complaint alleges facts which clearly support diversity jurisdiction over the wrongful death action therein.

64 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

Although the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), dealt with a suit in equity to enjoin a state official's execution of an assertedly unconstitutional statute, the Court's review of the scope of the Eleventh Amendment was not confined to suits seeking to vindicate the plaintiff's constitutional rights against state interference. As discussed in Part II above, as of 1908 the Eleventh Amendment had been construed as barring suits by a citizen against a state as a named defendant, against a state official for monies from a state's treasury, and against a state official when the requested relief would require specific performance of a contract by the state. See *Ex parte Young, supra*, 209 U.S. at 150-52.

Since the Supreme Court's discussion in *Ex parte Young*, the scope of the Eleventh Amendment has not been expanded so as to encompass the present wrongful death actions. See generally Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207, 230-34 (Winter 1968). Irrespective of whether a citizen's suit asserts a constitutional claim, the test under the Eleventh Amendment has consistently been whether a state is a "real, substantial party in interest." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). See also *In re Ayers*, 123 U.S. 443 (1887). Moreover, the Supreme Court has consistently noted that the Amendment presents no bar to a citizen's suit against a state official, individually, for his wrongful acts. See *Ford Motor Co. v. Department of Treasury, supra*, 323 U.S. at 462; *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 51 (1943) (quoted in Part II of this dissent).

The present wrongful death actions seek damages from the named defendants through their personal liability, as do the Section 1983 counterparts. They do not name the State of Ohio as a defendant; they do not seek monies from the State's treasury; they do not seek any type of relief under a contract with the State; nor does the State of Ohio have any cognizable

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 65

interest in these actions which could render it a real party in interest.

I therefore would hold that the wrongful death actions asserted in the three complaints — like their Section 1983 counterparts — are not suits against the State so as to invoke the Eleventh Amendment's prohibition.

Unlike the scope of the Eleventh Amendment and the applicability of doctrines of personal or executive immunity under Section 1983, the question of whether the wrongful death actions are barred by the Defendants-Appellees' personal immunity is governed by Ohio law. See *Carter v. Carlson*, 447 F.2d 358, 361-65 (D.C. Cir. 1971), *cert. granted sub. nom. District of Columbia v. Carter*, 404 U.S. 1014 (1972) (applying local, common law rules of immunity to common law tort actions, but rejecting the applicability of these rules to claims under Section 1983). Cf. *Roberts v. Williams*, 456 F.2d 819, 830 (5th Cir.) *cert. denied*, 404 U.S. 866 (1971) (applying state law in finding no liability under pendent, state law claims, but relying on federal case law in finding liability under Section 1983).

With respect to the personal, civil liability of its officials in the performance of their duties, Ohio has adopted the common law distinction between discretionary and ministerial functions and recognizes a limited immunity for officials acting within the former context. It is established in Ohio that a public official is individually liable for negligence in performing a ministerial function, but a public official, acting within the scope of his authority and in the absence of bad faith or a corrupt motive, is not individually liable for his failure to properly perform a duty involving judgment and discretion. *Gregory v. Small*, 39 Ohio St. 346 (1883); *Thomas v. Wilton*, 40 Ohio St. 516 (1884). See cases cited 44 Ohio Jur. 2d 570, n.18.

It is clear from the complaints that the alleged actions of Governor Rhodes and President White involve the exercise of

judgment and discretion within the above rule. Thus it is alleged that Governor Rhodes unnecessarily ordered the National Guard troops to duty on the Kent State Campus, permitted the troops to carry loaded weapons, permitted the troops to shoot at persons without justification, and ordered the troops to break up all assemblies, whether lawful or unlawful, and that President White failed to take any actions to control the National Guard troops on the Kent State Campus or to decrease the risk of injury and death. These actions or inactions appear to be inherently discretionary, requiring the judgment of the respective Defendants-Appellees.

It is further alleged, however, that the conduct of all Defendants-Appellees was intentional, willful, wanton, and reckless. These allegations, if proven, would establish the bad faith and/or corrupt motive necessary to remove the above-named Defendants-Appellees from the official immunity which would otherwise protect them from personal liability for their discretionary acts. Although the burden upon Plaintiffs-Appellants in proving the latter allegations would have been difficult, the District Court heard no evidence respecting these allegations and therefore could not properly dismiss the wrongful death actions as against these Defendants-Appellees.

With respect to Adjutant General Del Corso and Assistant Adjutant General Canterbury, the complaints allege that these Defendants-Appellees intentionally, willfully, wantonly, and recklessly caused and ordered inadequately trained and incapable National Guard troops to carry loaded weapons, to shoot at persons without legal justification, and to engage in actions which increased the risk of injury and death to persons on or near the campus. Beyond the generality of the last clause, these alleged actions similarly appear to be discretionary in nature, so as to invoke the limited common law immunity recognized for such actions. Again, however, the District Court could not properly dismiss the wrongful death actions as against these Defendants-Appellees without receiving evidence respecting the allegations of bad faith and/or

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 67

corrupt motive, which, if proven, would remove these parties from the common law immunity.

From the complaints alone, however, it is not clear whether the alleged actions of Defendants-Appellees Del Corso and Canterbury are asserted to have taken place at the scene of the disturbances on the Kent State campus or, alternatively, whether the alleged acts of these Defendants-Appellees assertedly took place at some point away from the scene of those disturbances. Whereas the limited common law immunity discussed above may be applicable to these Defendants-Appellees for any discretionary acts in the latter context, any actions in the former context would invoke the limited statutory immunity which the Ohio Legislature has expressly provided in O.R.C. § 5823.37:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."¹⁵

From the clear language of the statute, it appears that the legislature intended to afford this limited immunity to all members of the organized militia, regardless of rank, so long as their actions fall within the terms of the statute. Therefore, if it had been established that Defendants-Appellees Del Corso and Canterbury engaged in acts encompassed by the terms of O.R.C. § 5923.37, that statute, rather than the common law immunity described above, would have governed the question of their potential liability for those acts. As clearly prescribed by O.R.C. § 5923.37, liability would have

¹⁵ O.R.C. § 5923.37 became effective September 1, 1967, along with its companion statute, O.R.C. § 5923.36, establishing a 2-year statute of limitations for any civil suit against a member of the organized militia alleging willful and wanton misconduct in actions described in § 5923.37. I am aware of no decisions which have applied either statute, and no legislative history is available.

68 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

rested for acts encompassed therein only if Plaintiffs-Appellants had been able to prove their allegations that the asserted conduct of Defendants-Appellees Del Corso and Canterbury was willful and wanton.

The alleged actions of Major Jones, Captains Martin and Srp, and the unnamed National Guardsmen¹⁶ appear to have assertedly taken place at the scene of the Kent State disturbances, within the terms of O.R.C. § 5923.37, as discussed above. Thus, it is alleged that Major Jones and Captains Martin and Srp intentionally, willfully, wantonly, and recklessly caused and ordered National Guard troops to shoot at and in the direction of persons without justification, or, alternatively, failed to restrain the troops under their command. It is alleged that the unnamed members of the National Guard intentionally, willfully, wantonly, and recklessly shot at and in the direction of persons on the Kent State Campus or, alternatively, if so ordered to shoot, that such orders were patently unjustified and illegal. Without having heard evidence respecting the allegations of intentional, willful, and wanton misconduct, the District Court could not properly dismiss the wrongful death actions as against these Defendants-Appellees.

I therefore believe that the District Court erred in dismissing the wrongful death actions set forth in the Krause and Miller complaints, which were before the Court under its original, diversity jurisdiction. These actions are not barred

¹⁶ As initially noted in this dissent, the Krause complaint names only Governor Rhodes, Adjutant General Del Corso, and Assistant Adjutant General Canterbury as defendants. As additional defendants, the Miller and Scheuer complaints name the parties referred to in the text. The Miller complaint alone names Alexander Stevenson as yet another defendant. Although the Miller complaint does not allege acts of Stevenson individually, it appears that his immunity, if any, should have been governed by the present considerations in the text.

Ultimate determination of the applicability of common law and statutory immunities to each of the named and unnamed members of the National Guard, including Defendants-Appellees Del Corso and Canterbury, should have rested upon evidence introduced during

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 69

by the Eleventh Amendment. Moreover, the complaints sufficiently allege conduct which, if proven, would remove the respective Defendants-Appellees from the common law and statutory immunities which might otherwise bar the wrongful death actions.

VI.

One aspect of the alleged conduct of Defendant-Appellee Governor Rhodes warrants special comment. Among the alleged actions of Governor Rhodes for which redress is sought is his ordering the National Guard troops to duty on the Kent State Campus when such action was unnecessary. The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive and, in and of itself, is not subject to judicial review. This rule was reaffirmed in *Sterling v. Constantin*, 287 U.S. 378, 399 (1932), notwithstanding the Supreme Court's review of the actions of the Governor and National Guard subsequent to the call-up in that case. See Part IV of this dissent. With respect to the Section 1983 claims, Governor Rhodes' decision to order the National Guard to duty on the Kent State Campus therefore could not have been reviewed as a basis for liability. See *Morgan v. Rhodes*, 456 F.2d 608, 610-11 (6th Cir. 1972), cert. granted sub nom., *Gilligan v. Morgan*, No. 71-1553, 41 U.S.L.W. 3221 (U.S. Oct. 24, 1972). This deference which must be given to the Governor's decision to call up the Guard did not, however, preclude judicial review of his ancillary and subsequent conduct alleged in the complaints as a basis for liability under the statute. See *Sterling v. Constantin*, supra, 287 U.S. at 398-401; *Morgan v. Rhodes*, supra, 456 F.2d at 612-13.

For the reasons set forth in this dissent, I would reverse the ruling of the District Court and remand the suits for further proceedings.

Memorandum and Order**[Filed June 2, 1971]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ARTHUR KRAUSE,)	Memorandum
Administrator of the Estate of)	and
ALLISON KRAUSE, deceased)	Order
Plaintiff,)	
v.)	Civil Action No.
)	C 70-544
GOVERNOR JAMES RHODES, et al.,)	
Defendants.)	
ELAINE B. MILLER, Administratrix)	
of the estate of JEFFREY GLENN)	
MILLER, deceased,)	
Plaintiff,)	
v.)	Civil Action No.
)	C 70-816
JAMES RHODES, et al.,)	
Defendants.)	
SARAH SCHEUER, Administratrix)	
of the Estate of SANDRA LEE)	
SCHEUER, deceased,)	
Plaintiff,)	
v.)	Civil Action No.
)	C 70-859
JAMES RHODES, et al.,)	
Defendants.)	

CONNELL, J.

Before this court are defendants' motion to dismiss in the above-captioned cases. In *Krause v. Rhodes*, jurisdiction is predicated upon 42 U.S.C. 1983, for violation of Equal-Protection and Due Process guaranteed under the United States Constitution, and under 28 U.S.C. Sections 1331 and 1334.

This action maintains that "all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio", to violate the plaintiffs' rights to Equal Protection of the Law and Due Process of Law guaranteed under the United States Constitution."

The complaint of *Elain B. Miller, Administratrix v. James Rhodes, et al.*, also alleges jurisdiction under 42 U.S.C. Section 1983 for seeking "redress for the deprivation under color of state law of the life of Jeffrey Glenn Miller, his rights, privileges, and immunities secured by the Constitution of the United States."

The action filed by *Sarah Scheuer v. James Rhodes, et al.*, alleges violations of 42 U.S.C. Section 1983 seeking "redress of deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States."

In reading the complaints in these three cases, the alleged incidents all took place at the same time under the same circumstances arising out of a confrontation between Ohio National Guard troops and students on the campus of Kent State University on May 4, 1970. In reading the complaint further, it is pointed out that all plaintiffs, except Sarah Scheuer, are residents of states other than Ohio and all defendants are residents

of the State of Ohio. These cases, being exact in allegations, jurisdiction being predicated upon Section 1983 in all cases, the defendants being the same, with few inconsequential exceptions, and the events allegedly having taken place at the same time, this Court shall rule on all the motions to dismiss at this time in this memorandum and order.

The defendant, James Rhodes, Governor of the State of Ohio, maintains that in all three actions that this Court lacks jurisdiction over the defendant in his representative capacity as a public official and agent of the sovereign State of Ohio, since this action is essentially against the State of Ohio, and no waiver of its constitutional right to sovereign immunity has been granted. Further, Governor James Rhodes maintains that nowhere in the plaintiffs' complaint does an allegation appear that any negligent, wilful or wanton act was committed by Governor James Rhodes.

The defendants, Adjutant General Sylvester Del Corso and Brigadier General Robert Canterbury, both of the Ohio National Guard, motion to dismiss the complaints in the three above-captioned cases before this court, and Robert White, President of Kent State University seeks dismissal in two of the cases, C 70-816 and C 70-859; this defendant not having been named in C 70-544. These defendants maintain that they are sued in their representative capacities as public officials and agents of the sovereign State of Ohio, and this complaint being brought against them in their representative capacities is a suit against the State of Ohio, and that this State having not consented to the suit, sovereign immunity prevents the plaintiffs from bringing this action.

The defendants, Major Harry D. Jones, Captain Raymond J. Srp and Captain John E. Martin, and all

officers and men in the Ohio National Guard, also move this court for a dismissal of the complaint in civil actions C 70-816 and C 70-859, maintaining that the court lacks jurisdiction over the subject matter. These defendants claim that they are being sued in their representative capacities as military officers and agents of the sovereign State of Ohio, and that the complaint is one in which the State of Ohio is primarily concerned and the state not having waived sovereign immunity, the case must be dismissed.

The National Guard is authorized by Ohio law under Section 5923.01 et seq., of the Ohio Revised Code. The duties of the Governor with respect to the use of the state militia are expressed in Section 5923.21 of the Ohio Revised Code. This statute gives the Governor of Ohio the power to order the organized militia into service to:

“aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.”

Further, Section 5923.22 of the Ohio Revised Code enables the Governor to order the

“commanding officer of any regiment, battalion, company, troop or battery of the organized militia, to order his command or part thereof”

into service

“to act in aid of the civil authorities”

when there is

“tumult, mob riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property or by force or violence break or resist the laws of the state.”

Section 5923.37 of the Ohio Revised Code provides immunity for members of the state militia

"when a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

The Eleventh Amendment to the United States Constitution states that:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state."

The United States Supreme Court stated in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933), that;

"The Eleventh Amendment is an explicit limitation of the judicial power of the United States . . . (quoting the Eleventh Amendment) . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.' *Ex parte New York*, 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans v. Louisiana*, 134 U.S. 1, 10; *Palmer v. Ohio*, 248 U.S. 32, 34; *Duhne v. New Jersey*, 25 U.S. 311, 313, 314."

In the case of *Ford Motor Co. v. Department of Treasury of Indiana, et al.*, 323 U.S. 459 (1945), the Supreme Court again affirmed the law in *Fiske* and stated:

"the express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." (Citations omitted.)

In *Flitts v. McGhee*, 172 U.S. 516 (1898), the court reaffirmed the Eleventh Amendment prohibition of court interference with a state's sovereignty in a lawsuit brought by a citizen of the state. The court in the *Louisiana v. Jumel*, 107 U.S. 711 (1882), decision affirmed the sovereignty of a state in an unconsented lawsuit brought by a citizen of another state. These stated principles were reaffirmed by the Supreme Court in *Parden v. Terminal Railway of the Alabama State Docks Department, et al.*, 377 U.S. 184, 106 (1964). The Court in deciding whether a waiver of immunity had taken place stated clearly;

"Nor is a state divested of its immunity on the mere ground that the case is one arising under the Constitution or laws of the United States."

In *Fowler v. United States*, 258 F. Supp. 638 (D.C. Cal. 1966), the court in interpreting sovereign immunity and Sections 1981, 1985, and 1988 prohibited any use of these sections as a basis of civil actions against public officers acting in their official capacities in good faith and in pursuance of federal or state law.

The case of *Tenny v. Brandhave*, 341 U.S. 367 (1951); involving a suit for damages brought in federal district court against the defendants; members of a state legislature fact finding committee. The Court in reviewing this action affirmed immunity of legislators acting within

their official capacities and affirmed the district court's dismissal of the complaint stating on page 377;

"The claim of an unworthy purpose does not destroy the privilege . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive."

In *Kenny v. Killian*, 137 F. Supp. 571, 578 (W.D. Mich. 1955), the court also reviewing Section 1983 stated;

"Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities in good faith and in pursuance of State law."

See also *Copley v. Sweet*, 133 F. Supp. 502, 509 (W.D. Mich. 1955).

The basis for this principle is to permit those whose position in government compels action to proceed without hesitation in the "constant dread of retaliation." See *Gregorie v. Biddle*, 177 F.2d 579, 581 (C.A. 2nd 1949), *Bradley v. Fisher*, 13 Wall. 334; *Randall v. Brigham*, 7 Wall. 523, *Spaulding v. Vilas*, 161 U.S. 483.

The policy for affording this immunity to public officials, is further stated in *Fowler, supra*, and *Gregorie, supra*, these cases being federal officials; the *Fowler* court said of page 646,

"The well established principles of law summed up in the phrase, 'doctrine of sovereign immunity', stands as an unalterable and impregnable barrier between plaintiff and any injunctive relief against this defendant."

In *Gregorie, supra*, Judge L. Hand also stated on page 580;

"The immunity is absolute and is grounded on principles of public policy."

In *Dunn v. Estes*, 117 Supp. 146 (1953), the district court held that Section 1983 does not destroy the immunity of public officials acting in the performance of their official duties. In *Fowler, supra*, 646, the court does not acknowledge "persons" as used in 42 U.S.C. Section 1983 as including a "state or its governmental subdivision, acting in its sovereign, as distinguished from its proprietary, capacity." The State while acting in its sovereign capacity is not included within the purview of Section 1983, Title 28 U.S.C. See *Hewitt v. City of Jacksonville*, 188 F.2d 423 (1951), cert. den. 342 U.S. 835 (1951). The state subdivisions, city and county, are not a "person" within the meaning of Section 1983 and are immune from liability. *Sires v. Cole*, 320 F.2d 877 (1963); *Monroe v. Pape*, 365 U.S. 167 (1960).

The plaintiffs may not avoid sovereign immunity by naming individuals rather than the political division itself. In *Great Northern Ins. Co. v. Read*, 328 U.S. 47, 51 (1943), the Supreme Court stated;

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (citations omitted) ... A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment."

In *Ford Motor Co. v. Department of Treasury of Indiana, supra*, 464, the Court said:

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

The plaintiffs have cited cases where Section 1983 has been used as a basis for recovery against public officials. In *Monroe v. Pape, supra*, the Supreme Court permitted the use of Section 1983 as a basis for recovery against police officers for alleged violations of an individual's Fourteenth Amendment rights. The Court in this instance determined that sufficient allegations of "an officials abuse of his position" were presented.

In *Moyer v. Peabody*, 212 U.S. 78 (1909), Mr. Justice Holmes affirmed the order of a federal court in Colorado dismissing a lawsuit filed against the Governor of Colorado, the Adjutant General of the National Guard of that state, and a captain of a company of the militia, pursuant to R.S. Section 1979, 42 U.S.C. Section 1983, for alleged violations of the plaintiffs' Fourteenth Amendment rights. The governor in this case declared a county to be in a state of insurrection and called out the National Guard to suppress the trouble. In the course of controlling the outbreak, the plaintiff was arrested as a leader of the tumult and detained until he could be released with safety and turned over to the civil authorities and dealt with according to law. In upholding the Governor's actions, the High Court stated on page 85;

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief... Public danger warrants the substitution of executive process for judicial process. See *Keely v. Sanders*, 99 U.S. 441, 446... It is enough that in our opinion the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.' " See *Dow v. Johnson*, 100 U.S. 158.

The members of the Ohio National Guard are agents of the State of Ohio while acting in their official capacities. This definition of the law was affirmed in *Maryland, et al. v. United States*, 38; U.S. 41 (1965). In this instance the Court defined the state militia as being state employees. U.S. Const., Art. I, Section 8, cl. 15 and 16.

Furthermore, the law of the State of Ohio, Section 2923.55 of the O.R.C., holds all law enforcement officers and members of the organized militia guiltless for their acts in suppressing riot when such order to cease and desist has been issued pursuant to O.R.C. 2923.51.

The State of Ohio has established Kent State University pursuant to Section 3341.01 of the Ohio Revised Code. The board of trustees of this university, with the advice and consent of the senate, are responsible for the governing of this institution pursuant to Section 3341.02 of the Ohio Revised Code. Authorization is given to the trustees of the institution pursuant to Ohio Revised Code, Section 3341.01 to;

"Do all things necessary for the proper maintenance and successful and continuous operation of such universities."

Individuals may not maintain an action against a sovereign where consent has not been obtained. See *Palmer v. Ohio*, 248 U.S. 32 (1918) and also Article I, Section 16 of the Ohio Constitution as interpreted in *Randabough v. State*, 96 Ohio St. 513 (1916); *State ex rel. Williams v. Colonder*, 148 Ohio St. 188, (1947); *Wolfe v. Ohio State University Hospital*, 170 Ohio St. 49 (1959).

In *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. 6th, 1966) the court affirmed the dismissal of a tort action brought in federal court against a local school board and stated;

"It is the law of Ohio that a school board, when discharging a governmental function, is protected from tort liability by the doctrine of sovereign immunity. (citations omitted) . . . The decisions of the Ohio Courts in this litigation reaffirm the adherence to the doctrine of sovereign immunity, and found it applicable here. We follow Ohio law in this tort action unless such law offends federal law or the United States Constitution. *Erie R.R. v. Tomkins*, 304 U.S. 64, (1938); *Williams v. Kaiser*, 323 U.S. 471, (1945); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, (1940)."

As stated in *Moyer, supra*, p. 83,

"It is admitted as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of the fact . . ."

And in Justice Holmes' comparison of a Governor to the Captain of a ship, the Court said on page 85;

"But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. (citations omitted)."

The Eleventh Amendment to the United States Constitution prohibits a suit by an individual of another state against one of the United States.

The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it.

The purpose of this Eleventh Amendment is to enable the sovereign to act without fear of lawsuit in preventing mob action. Quelling riot is the duty of the state, and its actions in preventing an unrestrained mob bent on violating the rights of its citizens is the act of the State of Ohio.

This court is mindful of the circumstances where individual officials of a state or its subdivisions have abused their power under color or law giving rise to an action under Section 1983.

The existence of riot is determined by the Governor, and when so determined, the use of the militia in discharging the executive function of law enforcement is the inherent right and duty of the sovereign.

All the individuals of the militia acting in their duties pursuant to the orders of the Governor of the State of Ohio are acting within the sovereign's capacity to enforce the law, and the Eleventh Amendment right to immunity applies to each individual acting in this capacity.

This court holds that the actions of Governor James Rhodes in calling out the National Guard pursuant to the proclamation issued was the decision of the Executive, and this federal court is without jurisdiction to review.

The law provides that the use of the militia in time of tumult is the inherent and exclusive duty of the executive alone. In this instant case, there has been no recital of any claimed factual situation tending to substantiate the plaintiffs' allegations that an abuse of this duty existed, or that conspiracy actually existed in the slightest degree between any of the defendants so named in the complaints.

The Eleventh Amendment to the United States Constitution prohibits this court from exercising jurisdiction in this case and this court so finds.

All defendants, including President White, are sued in their official capacities and sovereign immunity so extends.

The above-captioned cases are dismissed as to all defendants.

The complaints in cases C 70-544, C 70-816 and C 70-859 are dismissed at plaintiffs' cost.

IT IS SO ORDERED.

/s/

JAMES C. CONNELL, Judge
United States District Court

DATED JUNE 2nd, 1971.

VARIOUS OFFICERS AND ENLISTED MEN,:

Who are members of G Company, 107th
 Armored Calvary Regiment of the Ohio :
 National Guard and A Company First :
 Battalion 145th Infantry Regiment of :
 The Ohio National Guard :
 Fort Hayes :
 Columbus, Ohio :

ROBERT WHITE,

President, Kent State University :
 Kent State University :
 Kent, Ohio :

Defendants :

Plaintiff, Sarah Scheuer, by her attorneys, Nelson G. Karl and Walter S. Haffner, for her Complaint herein, alleges:

1. Plaintiff is a citizen of Ohio, residing at 4559 Montrose Avenue, Boardman, Ohio, and is the duly appointed Administratrix of the Estate of Sandra Lee Scheuer, plaintiff's daughter, who died on May 4, 1970, as a result of the actions of defendants about which plaintiff complains in this action. Plaintiff was appointed Administratrix of the Estate of Sandra Lee Scheuer on August 5, 1970, by the Probate Division of the Court of Common Pleas of Mahoning County, Ohio.

2. Defendant Rhodes was governor of Ohio during the period leading up to May 4, 1970, and on that date. As a result of his state office, Defendant Rhodes exercised the authority to call up, and otherwise direct the operations of, The Ohio National Guard.

3. Defendant Del Corso was Adjutant General of The Ohio National Guard during the period leading up to May 4, 1970, and on that date.

4. Defendant Canterbury was a brigadier general and Assistant Adjutant General of The Ohio National Guard during the period leading up to May 4, 1970, and on that date, and was present and in command of Ohio National Guard troops positioned in and about the Kent State University Campus on May 3, 1970.

5. Defendant Jones was a major of The Ohio National Guard during the period leading up to May 4, 1970, and on that date and was in immediate command of a contingent of Ohio National Guard troops on the Kent State University main campus on May 4, 1970.

6. Defendants Srp and Martin were captains of The Ohio National Guard during the period leading up to May 4, 1970, and on that date and were in command of contingents of Ohio National Guard troops on the Kent State University main campus on May 4, 1970.

7. Certain officers and enlisted men of The Ohio National Guard members of G Company, 107th Armored Cavalry Regiment, and A Company, 145th Infantry Regiment were under the direction of the above-named defendants and engaged in acts set forth below. (These persons will be referred to hereafter as "the unnamed Ohio National Guard Members".) The names of the unnamed Ohio National Guard Members are not now known to plaintiff. The unnamed Ohio National Guard Members will be joined as defendants as soon as their names become known to plaintiff and leave is given by this Court.

8. Kent State University was, during the period covered by this Complaint, a State University of Ohio organized pursuant to the laws of Ohio and had its main campus in the City of Kent, Portage County, Ohio.

9. Defendant White was President of Kent State University during the period leading up to May 4, 1970, and on that date.

10. Plaintiff's Decedent, Sandra Lee Scheuer, was a full-time student enrolled in Kent State University. On May 4, 1970, plaintiff's decedent was shot and killed by a bullet shot by one of the unnamed Ohio National Guard members. Prior to her death, plaintiff's decedent suffered conscious pain and suffering. At the time she was shot, plaintiff's decedent was neither engaged in a riot nor any other criminal or disruptive activity.

11. This Court has jurisdiction pursuant to Title 42, United States Code, Section 1983, and Title 28, United States Code, Sections 1343 and 1331, in that plaintiff's first claim seeks redress for the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States, and it arises under federal law, with the matter in controversy exceeding \$10,000.00 exclusive of interest and costs. All other claims are cognizable by this Court pursuant to the doctrine of pendent jurisdiction.

FIRST CLAIM

12. Defendants, acting in concert and under color of state law, subjected, and caused to be subjected, plaintiff's decedent, to the deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States and the deprivation of life without due process of law, in that, as a result of their actions on May 4, 1970, and the days prior thereto, plaintiff's decedent was shot and killed on May 4, 1970, by a bullet fired by one of the unnamed national guard members.

13. Defendants in the period in question committed, among others, the following acts which effected the deprivation alleged in Paragraph 12:

(a) Defendant Rhodes, intentionally, recklessly, wilfully and wantonly ordered members of The Ohio National Guard to duty on and about Kent State University's main campus when such action was unnecessary. He engaged in rhetoric and gave Ohio National Guard officers orders which substantially increased the risk of unnecessary violence in and about Kent State University's main campus. He permitted Ohio National Guard troops in and about Kent State University's main campus to carry guns loaded with live ammunition, under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting of innocent persons, and permitted them to use such guns to shoot at persons without justification. He intentionally, recklessly, wilfully and wantonly ordered members of The Ohio National Guard to break up all assemblies without regard to whether said assemblies were lawful or unlawful. Defendant Rhodes' actions exceeded the scope of his office, and if within his office, were arbitrary, reprehensible and in gross abuse of office.

(b) Defendant Del Corso intentionally, recklessly, wantonly, and wilfully ordered and caused inadequately trained and incapable Ohio National Guard troops to (1) carry guns loaded with live ammunition in and about the Kent State University's main campus, under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting of innocent persons, (2) to shoot such guns at persons without legal justification, and (3) to engage in actions which increased the risk of injury and death to persons in and about Kent State University's main campus.

(c) Defendant Canterbury intentionally, recklessly, wantonly and wilfully caused and ordered inadequately trained and incapable Ohio National Guard troops to (1) carry guns loaded with live ammunition in and about Kent State University's main campus under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting of innocent persons, (2) to shoot such guns at persons without legal justification, and (3) to engage in actions which increased the risk of injury and death to persons in and about Kent State University's main campus.

(d) Upon information and belief, it is alleged that Defendants Jones, Martin and Srp intentionally, recklessly, wantonly, and wilfully caused and ordered Ohio National Guard troops to shoot guns at and in the direction of persons without legal justification and to engage in actions which increased the risk of injury and death to persons in and about Kent State University's main campus. Alternatively, Defendants Jones, Martin and Srp wantonly, wilfully and recklessly failed to restrain Ohio National Guard troops under their command from shooting guns, and causing others to shoot guns, without legal justification, at and in the direction of persons on Kent State University's main campus.

(e) The unnamed Ohio National Guard members intentionally, recklessly, wantonly and wilfully shot guns at and in the direction of persons on Kent State University's main campus without legal justification and caused others to do so. Alternatively, if the unnamed Ohio National Guard members were ordered to shoot at persons on Kent State University's main campus, such orders were patently unlawful and did not legally justify shooting at or in the direction of such persons.

(f) Defendant White recklessly, wilfully and wantonly omitted to take any actions to exercise control of Ohio National Guard activities on Kent State University's main campus or to decrease the risk of injury or death there when such actions could have decreased such risk.

SECOND CLAIM

14. Plaintiff incorporates by reference the allegations of paragraph 1-13 of this Complaint.

15. Defendant Rhodes engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

THIRD CLAIM

16. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

17. Defendant Rhodes negligently caused plaintiff's decedent to be shot and killed when under a legal duty not to do so.

18. Plaintiff's decedent was not contributorily negligent.

FOURTH CLAIM

19. Plaintiff incorporates by reference the allegations of paragraph 1-13 of this Complaint.

20. Defendants Del Corso and Canterbury engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

FIFTH CLAIM

21. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

22. Defendants Del Corso and Canterbury negligently caused plaintiff's decedent to be shot and killed when under a legal duty not to do so.

23. Plaintiff's decedent was not contributorily negligent.

SIXTH CLAIM

24. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

25. Defendants Jones, Martin and Srp engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

SEVENTH CLAIM

26. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

27. Defendants Jones, Martin and Srp negligently caused plaintiff's decedent to be shot and killed when under a legal duty not to do so.

28. Plaintiff's decedent was not contributorily negligent.

EIGHTH CLAIM

29. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

30. The unnamed Ohio National Guard members intentionally caused plaintiff's decedent to be shot and killed.

NINTH CLAIM

31. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

32. The unnamed Ohio National Guard members engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

TENTH CLAIM

33. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

34. Defendant White negligently caused plaintiff's decedent to be shot and killed when under a legal duty to act to protect plaintiff's decedent.

35. Plaintiff's decedent was not contributorily negligent.

WHEREFORE, plaintiff prays for judgment of compensatory damages against all defendants, jointly and severally, in the amount of One Million Dollars, (\$1,000,000.00), and for punitive damages in an amount

which this Court determines is just and proper, together with the costs and disbursements of this action.

NELSON G. KARL, of the American Civil Liberties Union of Ohio, Attorney for Plaintiff

33 Public Square, Suite 210
Cleveland, Ohio 44113 (696-6868)

WALTER S. HAFFNER, of the American Civil Liberties Union of Ohio, Attorney for Plaintiff

1008 Standard Building
Cleveland, Ohio 44113 (241-6443)

OF COUNSEL:

MELVIN L. WULF
SANFORD JAY ROSEN
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

MICHAEL S. HARSHMAN
American Civil Liberties Union
of Youngstown, Ohio
202 Legal Arts Centre
Youngstown, Ohio 44503

STANLEY K. LAUGHLIN
MICHAEL E. GELTNER
American Civil Liberties Union
of Ohio
203 East Broad Street
Columbus, Ohio 44113

NIKI Z. SCHWARTZ
EUGENE SIDNEY BAYER
American Civil Liberties Union
of Cleveland, Ohio
1302 Ontario Street
Cleveland, Ohio 44113

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG MORGAN

THOM DICKERSON

and

WILLIAM SLOCUM

suing individually and on

behalf of all others

similarly situated

Plaintiffs,

COMPLAINT NO. C70-961

-VS-

JAMES RHODES

Governor of Ohio

State House

Columbus, Ohio

SYLVESTER DEL CORSO

Adjutant General of The

Ohio National Guard

Fort Hayes

Columbus, Ohio

ROBERT CANTERBURY

Assistant Adjutant General

of The Ohio National Guard

Fort Hayes

Columbus, Ohio

Defendants,

Plaintiffs, by their attorney, Harold Weinstein, for their complaint herein, allege:

1. Plaintiff Morgan is a full-time student enrolled in Kent State University and is President of Kent State University's student body. Plaintiff Morgan is a resident of Columbus, Ohio.

2. Plaintiff Dickerson is a full-time student enrolled in Kent State University and is Vice-President of Kent State University's student body. Plaintiff Dickerson is a resident of Huntington, New York.

3. Plaintiff Slocum is a full-time student enrolled in Kent State University and is President Pro Tem of Kent State University's student senate. Plaintiff Slocum is a resident of Geneva, Ohio.

4. Plaintiffs bring this action in their individual capacities and also on behalf of all persons who are students of Kent State University and are, as a consequence, similarly situated. (Referred to hereafter as "other students.") The class is so large that joinder of all members is impracticable. There are questions of law and fact common to the claims of plaintiffs and those of the other students, and plaintiffs' claims are typical of those of the entire class. Defendants, and their agents, have acted, and threaten to act, toward the entire class in such a manner as to make appropriate an injunction and declaratory judgment on behalf of the entire class.

5. Defendant Rhodes is Governor of Ohio and, pursuant to his office, is Commander-in-Chief of the Ohio National Guard and has authority to call to active duty, supervise and direct, the operations of Ohio National Guard troops.

6. Defendant Del Corso is a general of the Ohio National Guard, is Adjutant General of the Ohio National Guard and directs and supervises the training, procedures and operations of the Ohio National Guard.

7. Defendant Canterbury is a general of the Ohio National Guard, is Assistant Adjutant General of the Ohio National Guard and, upon information and belief, assists Defendant Del Corso in directing and supervising the training, procedures and operations of the Ohio National Guard. Defendant Canterbury was in direct command of a contingent of Ohio National Guard troops which had been called to active duty and assigned, on or about May 2, 1970, to operate in and about the main campus of Kent State University, as set forth in greater detail below.

8. Kent State University is a State University organized and operated pursuant to the laws of Ohio and has its main campus in the City of Kent, Portage County, Ohio. From about May 1, 1970, to May 4, 1970, Kent State University was the scene of certain demonstrations and disorders, as set forth in greater detail below. Any references hereafter to events at "The Kent Campus" refer to Kent State University's main campus.

9. This Court has jurisdiction of this action pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343(3) and 2201, in that plaintiffs seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution of the United States by means of injunctive relief and a declaratory judgment.

10. On or about May 1, 1970, there occurred certain disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus.

11. On May 2, 1970, Defendant Rhodes ordered certain contingents of the Ohio National Guard to duty in and around the Kent campus under the supervision and direction of Defendants Del Corso and Canterbury. Thereafter, the Ohio National Guard troops, under the continued direction of defendants, committed certain acts which, as set forth below, deprived plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

The actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard under defendants' supervision and direction creates a substantial threat of repetition of similar acts and continues to deprive plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

12. Specifically, plaintiffs complain of the following past and continuing acts and conditions:

(a) Defendant Rhodes prematurely ordered Ohio National Guard troops to duty in and around the Kent campus to maintain order and perform functions normally reserved to police officers at a time when there was neither an invasion nor a breakdown of civilian authority and when civilian police forces were capable of administering civilian laws and maintaining order. The displacement of civilian police under such circumstances by a military force itself deprived plaintiffs and other students of rights secured by the First and Fourteenth Amendments, in that the presence of a military force inhibited the exercise of the rights of lawful assembly, speech and association. In addition, the unnecessary use of a military force to perform the functions of civilian

police substantially increased the risk of legally unjustified killing and injuring of civilians. On May 4, 1970, members of the Ohio National Guard fired their guns into a crowd of persons on the Kent State University main campus, injuring several students and killing four. The culpable and legally unjustified shooting of unarmed civilians by Ohio National Guard troops deprived such persons of life and liberty without due process of law. Unless this court enjoins Defendant Rhodes from prematurely displacing normal civilian authority with Ohio National Guard troops, plaintiffs and other students are imminently threatened with similar deprivations of life and liberty without due process of law and further deprivation of rights secured by the First and Fourteenth Amendments to the United States Constitution as a result of the unnecessary presence of a military force in and about the Kent campus. This threat is a real one and is exacerbated by Defendant Rhodes' actions in following a pattern throughout the State of Ohio of continued and premature use of Ohio National Guard troops to displace civilian authority far in excess of the National norm.

(b) Defendants failed to adequately provide Ohio National Guard troops with specialized training in control of civilian disorders or to provide them, when assigned to the Kent campus, with adequate equipment for dealing with civilian disorders by means other than the use of deadly force when such equipment, better adapted for dealing with civilian disorders than that utilized by the Ohio National Guard troops at the Kent campus, was available. Defendants also caused and ordered Ohio National Guard troops to carry live bullets ready for firing in their guns when on duty in and about the Kent campus. The use of inadequately trained troops, their

lack of equipment adapted for control of civilian disorders, and the use by Ohio National Guard troops of guns loaded with live bullets to control civilian disorders substantially increased the risk of the injuries and killings which occurred and, therefore, the deprivations of life and liberty without due process of law which occurred on May 4, 1970. This risk remains and constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law. Defendants continue to inadequately train Ohio National Guard troops for civilian disorder control, continue to fail to equip them with adequate equipment for dealing with civilian disorders and to cause and order them to carry live bullets loaded in their guns while on duty during civilian disorders. In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.

(c) Defendants permitted and caused Ohio National Guard troops to (1) engage in unlawful and unjustified beatings of students in and around the Kent campus. Beatings were administered to some students by Ohio National Guard troops, in part as a result of the exercise of the rights of speech and assembly by students who were beaten, and others. Defendants also permitted and caused Ohio National Guard troops to unlawfully detain, and cause to be detained, students, some as a result of the exercise by such students, and others, of the rights of speech and assembly. These actions of defendants, and their agents, have deprived persons of liberty without due process of law constituted a direct punishment without due process of law for the exercise of rights protected by the First and Fourteenth Amendments to the United

States Constitution. Because of the past actions of defendants' agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights. The threat of such punishment for exercise of rights protected by the First and Fourteenth Amendments inhibits and intimidates plaintiffs and other students in their exercise of such rights.

(d) Defendants caused and ordered Ohio National Guard troops to break up lawful and peaceable meetings, demonstrations and assemblies in and about the Kent campus and thereby deprived plaintiffs and other students of their rights of speech, assembly, association and petition of government. The meetings, demonstrations and assemblies broken up were, in part, protesting against the occupation of the campus by a military force. Defendants' actions violated the First and Fourteenth Amendments to the United States Constitution and substantially increased the risk of the unjustified killings and injuries which occurred on the Kent campus of May 4, 1970. They were not legitimized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorizes the imposition of Martial Law except during time of invasion or breakdown of civil authority, or authorizes a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard

troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops.

(e) Defendants, and their agents, acted in part under the authority of Section 2923.55 of the Ohio Revised Code which provides, in pertinent part, that "members of the organized militia . . . when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters." Section 2923.55 threatens plaintiffs and other students with deprivation of life and liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution in that it authorizes the injuring, killing and maiming of rioters by Ohio National Guard members and substantially increases the risk of use of deadly force in civilian disorders, thereby threatening not only rioters but all other persons in the vicinity of civilian disorders. Section 2923.55 further invidiously discriminates against persons who might, even erroneously, be identified as a rioter during civilian disorders, on no rational basis and singles out such persons for injuring, killing or maiming. Moreover, the existence of Section 2923.55, in connection with the other violations of rights set forth in this paragraph, increases the risk of further injury and killing of students, including plaintiffs, and therefore constitutes an imminent threat of deprivation of plaintiffs, and the other students, of the rights set forth above.

13. Plaintiffs and other students have no adequate remedy at law, because of the threat that irreparable

harm, in the form of further deprivations of privileges, rights and immunities protected by the First and Fourteenth Amendments to the United States Constitution, will be effected by defendants, and Ohio National Guard troops operating under their direction, unless the relief sought in this action is granted. This controversy is neither moot nor unripe for decision, because the practices and conditions which resulted in the past violations alleged in this complaint still obtain and directly threaten plaintiffs and other members of their class.

WHEREFORE, plaintiffs request that this Court enter judgment as follows:

(a) Enjoining Defendant Rhodes, and his successors in office, from ordering Ohio National Guard troops to maintain order or replace normal police forces in and about the Kent campus except in case of actual invasion or such breakdown of civilian authority that available civilian police forces are incapable of maintaining public order and administering the laws, and declaring any contrary use of Ohio National Guard troops in and about the Kent campus to be unlawful.

(b) Enjoining Defendants Rhodes, Del Corso and Canterbury, and their successors in office, from using Ohio National Guard troops for the control of civilian disorders in and about the Kent campus unless such troops have been competently trained in techniques of civilian disorder control, have been provided with the best available non-lethal equipment for use in civilian disorder control, have been specifically ordered and instructed not to use deadly force except in the case of actual self-defense or upon persons who have actually used or threatened the use of deadly force and have been

ordered not to carry live ammunition loaded in their guns when engaged in such control of civilian disorders, and declaring the use of Ohio National Guard troops contrary to these requirements to be unlawful.

(c) Enjoining Defendants Rhodes, Del Corso and Canterbury from either ordering or permitting Ohio National Guard troops to beat plaintiffs or other students in and about the Kent campus or unlawfully detain them, and declaring any contrary acts to be unlawful.

(d) Enjoining Defendants, and their successors, from ordering or permitting Ohio National Guard troops in and about the Kent campus to break up and/or disperse peaceful meetings or assemblies or arrest persons for attending them, except that defendants may reasonably limit the place of such meetings for legitimate purposes other than to prevent their occurrence, and from declaring any suspension of the right of assembly and declaring any actions to the contrary to be unlawful.

(e) Declaring Section 2923.55 of the Ohio Revised Code to be unconstitutional and void; and

(f) Granting such other further relief as this Court deems just and proper.

HAROLD WEINSTEIN
Attorney for Plaintiffs
American Civil Liberties Union
1715 The East Ohio Building
Cleveland, Ohio 44114
Tower 1-4076

Of Counsel:

Melvin Wulf
Sanford Jay Rosen
Lawrence Sager
Joel Gora
American Civil Liberties Union
156 Fifth Avenue
New York, New York
Niki Z. Schwartz
Stanley K. Laughlin
Michael E. Geltner
American Civil Liberties Union of Ohio
203 East Broad Street
Columbus, Ohio

Eugene Sidney Bayer
American Civil Liberties Union of Cleveland
819 National City Bank Building
Cleveland, Ohio

Michael Harshman
American Civil Liberties Union of Youngstown
202 Legal Arts Center
Youngstown, Ohio

In the Supreme Court of the United States

October Term, 1972

No. **72-1318**

FILED
OCT 23 1972

ARTHUR KRAUSE, Administrator of the
of Allison Krause, Deceased, Petitioner,

vs.

GOVERNOR JAMES RHODES, SYLVESTER DEL
CORSO, and ROBERT CANTERBURY,
Respondents,

and

ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased, Petitioner,

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, ALEXANDER STEVENSON AND
VARIOUS OFFICERS AND ENLISTED MEN AND
ROBERT WHITE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

STEVEN A. SINDELL

JOSEPH M. SINDELL

SINDELL, SINDELL, BOURNE, STERN & SPERO

1400 Leader Building

Cleveland, Ohio 44114

Attorneys for Petitioners, Elaine B.

Miller and Arthur Krause

JOSEPH KELNER

KELNER, STELLJES & GLOTZER

217 Broadway

Suite 600

New York, New York 10007

Attorney for Petitioner, Elaine B.

Miller

TABLE OF CONTENTS

Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved in the Case	4
Statement of the Case	6
Reasons for Allowance of the Writ	9
1. On a Defendant's Motion to Dismiss a Complaint Based Solely Upon the Sufficiency of the Allega- tions of That Complaint, May a Trial or Appellate Court Assume as True Factual Matters Which Are Contrary to the Allegations of That Com- plaint?	9
2. Does the Eleventh Amendment Bar a Damage Action Brought Against the Governor of Ohio, and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities While Acting Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, Which Neither Names the State of Ohio As a Party Defendant, Nor Seeks to Recover Any Damages Payable Through the Treasury of the State of Ohio or Through Any Public Funds?	16
3. Does Any Doctrine of Executive Immunity Bar a Damage Action Against the Governor of Ohio and Against Generals and Officers of the Ohio National Guard Acting in Their Individual Capacities, Individually and in Conspiracy, Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Sec- tion One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?	19

4. Where Citizens of Pennsylvania and New York Bring Damage Actions in Federal Court Against the Governor of Ohio and Against Generals and Officers of the Ohio National Guard, These Defendants All Being Citizens of Ohio, for Committing Individually and in Conspiracy the Wanton Killing of Innocent Students on a College Campus, and Where an Ohio Statute (Ohio Revised Code §5923.37) Specifically Provides for Liability Under Such Circumstances, Does a Federal Court Have Jurisdiction Based Upon the Diversity of Citizenship of the Parties?	22
5. Is the United States a Necessary Party in a Damage Action Brought Against the Governor of Ohio and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities Alleging That These Defendants, Acting Individually and in Conspiracy Under Color of State Law, Committed Intentional Deprivations of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?	25
Conclusion	26
Appendix:	
Opinion of the Court of Appeals	27
Judgment of the Court of Appeals in Krause Case	28
Judgment of the Court of Appeals in Miller Case	30
Order of the Court of Appeals Denying Petition for Rehearing	32
Memorandum and Order of District Court	34
Amended Complaint in Krause Case	47
Complaint in Miller Case	52

III

TABLE OF AUTHORITIES

Cases

<i>American Federation of State, County and Municipal Employees v. Woodward</i> , 406 F.2d 137 (8th Cir. 1969)	17
<i>Bayer v. Chaloux</i> , 288 F. Supp. 366 (N.D. N.Y. 1968)	17
<i>Birnbaum v. Trussel</i> , 347 F.2d 86 (5th Cir. 1965)	20
<i>Board of Trustees of Arkansas A. & M. College v. Davis</i> , 396 F.2d 730 (8th Cir.), cert. denied 89 Sup. Ct. 401 (1968)	17
<i>Carter v. Carlson</i> , 447 F.2d 358 (D.C. Cir. 1971), cert. granted in part sub nom. <i>District of Columbia v. Carter</i> , 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972) ..	20
<i>Ford Motor Co. v. Treasury Department of Indiana</i> , 323 U.S. 459 (1944)	17
<i>Georgia Railroad and Banking Co. v. Redwine</i> , 342 U.S. 299 (1952)	17
<i>Jobson v. Henne</i> , 355 F.2d 129 (2nd Cir. 1965)	20
<i>Jones v. Perrigan</i> , 459 F.2d 81 (6th Cir. 1972)	20
<i>Joseph v. Rowlen</i> , 402 F.2d 367 (7th Cir. 1968)	20
<i>Krause, Admr. v. State of Ohio</i> , 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972)	24
<i>McLaughlin v. Tilendis</i> , 398 F.2d 287 (7th Cir. 1968)	20
<i>Meredith v. Allen County War Memorial Hospital Ass'n.</i> , 397 F.2d 33 (6th Cir. 1968)	20
<i>Moyer v. Peabody</i> , 212 U.S. 78 (1909)	20, 21
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963)	11
<i>Roberts v. Williams</i> , 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972)	20

IV

<i>Scolnick v. Winston</i> , 219 F. Supp. 836 (S.D. N.Y. 1963), affirmed 329 F.2d 716 (2nd Cir. 1964)	17
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966)	11
<i>Sostre v. McGinnis</i> , 442 F.2d 178 (2nd Cir. 1971)	17, 20
<i>Sterling v. Constantin</i> , 287 U.S. 378 (1932)	20
<i>Whirl v. Kern</i> , 407 F.2d 781 (5th Cir. 1968)	20
<i>Whitner v. Davis</i> , 410 F.2d 24 (9th Cir. 1969)	17
<i>Young, Ex Parte</i> , 209 U.S. 123 (1908)	16

Constitution, Statutes and Rules

United States Constitution:

Eleventh Amendment	4, 7, 16, 17, 18, 23
Fourteenth Amendment	18, 24
Civil Rights Act of April 20, 1871, Section One, 17 Stat. §13, 42 U.S.C. §1983	3, 4, 5, 7, 8, 16, 18, 19, 25
28 U.S.C. §1343(3) and (4)	5
Ohio Revised Code §5923.37	4, 5, 7, 22, 23
Federal Rules of Civil Procedure 12(b) (1) and 12(b) (6)	7

In the Supreme Court of the United States

October Term, 1972

No. _____

**ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased, Petitioner,**

vs.

**GOVERNOR JAMES RHODES, SYLVESTER DEL
CORSO, and ROBERT CANTERBURY,
Respondents,**

and

**ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased, Petitioner,**

vs.

**JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, ALEXANDER STEVENSON AND
VARIOUS OFFICERS AND ENLISTED MEN AND
ROBERT WHITE, Respondents.**

**PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit**

The Petitioners, Arthur Krause and Elaine Miller, request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit (and the order denying rehearing), affirming the judgment of the United States District Court, for

the Northern District of Ohio, Eastern Division, which dismissed the amended complaint of petitioner Krause and the complaint of petitioner Miller in this action against all defendants.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet officially reported. It was included in the appendix of the Petition for Writ of Certiorari in the case of Sarah Scheuer vs. James Rhodes, et al., United States Supreme Court Case No. 72-914, at pp. 1A-69A therein. The decision of the United States Court of Appeals for the Sixth Circuit was rendered in *Krause v. Rhodes, et al.* and *Miller v. Rhodes, et al.* (Nos. 71-1622 and 71-1623, 6th Cir.), which were consolidated along with the Scheuer case into one opinion by the United States Sixth Circuit Court of Appeals and by the United States District Court, and therefore the present Petition for Writ of Certiorari on behalf of petitioners Krause and Miller does not contain that lengthy opinion in its appendix, but incorporates it by reference to the Scheuer Appendix. The Judgment Entries of the Sixth Circuit Court of Appeals is printed in the appendix of this Petition at pp. 28-31.

The opinion of the District Court has not been reported. The District Court's Memorandum Opinion and Order is included in this appendix at page 34.

Because these cases were denied on motions to dismiss directed at the face of the complaints, a copy of their texts is included in the appendix, the amended complaint in Krause at page 47 and the complaint in Miller at page 52; the texts are of particular importance in reading this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 17, 1972. On January 3, 1973, the Petition for Rehearing requested by petitioners Krause and Miller, which was timely filed, was denied by the United States Sixth Circuit Court of Appeals. (The order denying the Petition for Rehearing is reprinted in the appendix of this petition at page 32). This Petition for Writ of Certiorari is filed within the ninety (90) days after that date. The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED

1. On a defendant's motion to dismiss a complaint based solely upon the sufficiency of the allegations of that complaint, may a trial or appellate court assume as true factual matters which are contrary to the allegations of that complaint?

2. Does the Eleventh Amendment bar a damage action brought against the Governor of Ohio, and against generals and officers of the Ohio National Guard in their individual capacities while acting under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, which neither names the state of Ohio as a party defendant, nor seeks to recover any damages payable through the treasury of the state of Ohio or through any public funds?

3. Does any doctrine of executive immunity bar a damage action against the Governor of Ohio and against

generals and officers of the Ohio National Guard acting in their individual capacities, individually and in conspiracy, under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

4. Where citizens of Pennsylvania and New York bring damage actions in federal court against the Governor of Ohio and against generals and officers of the Ohio National Guard, these defendants all being citizens of Ohio, for committing individually and in conspiracy the wanton killing of innocent students on a college campus, and where an Ohio statute (Ohio Revised Code §5923.37) specifically provides for liability under such circumstances, does a federal court have jurisdiction based upon the diversity of citizenship of the parties?

5. Is the United States a necessary party in a damage action brought against the Governor of Ohio and against generals and officers of the Ohio National Guard in their individual capacities alleging that these defendants, acting individually and in conspiracy under color of state law, committed intentional deprivations of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . .

2. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. §1343(3) and (4), which provide:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

4. Ohio Revised Code §5923.37 (officially set forth in Baldwin's Ohio Revised Code Annotated, Vol. 7 at p. 21), reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act

performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

STATEMENT OF THE CASE

Petitioners filed separate complaints in the United States District Court, for the Northern District of Ohio, Eastern Division. These pleadings are self-explanatory (see appendix page 47 for the Amended Complaint in Krause and the appendix page 52 for the Complaint in Miller). Named as defendants in the Amended Complaint of Krause were Governor James Rhodes, Sylvester Del Corso and Robert Canterbury. Named as defendants in the Complaint of Elaine Miller were James Rhodes, Sylvester Del Corso, Robert Canterbury, Harry D. Jones, John E. Martin, Raymond J. Srp, Alexander Stevenson and Various Officers and Enlisted Men and Robert White. Defendants in each case filed motions to dismiss. These two cases and a third, the case of Sarah Scheuer v. James Rhodes, et al. (Petition for Writ of Certiorari, United States Supreme Court, Case No. 72-914) were consolidated for purposes of determination of the motions to dismiss by the District Judge. The United States Sixth Circuit Court of Appeals also treated the three cases together despite differences of counsel and some differences in the causes of actions that were raised. After disposition in the Court of Appeals, counsel in the Scheuer case promptly filed for certiorari while counsel for Krause and Miller instead moved for rehearing by the United States Sixth Circuit Court of Appeals. A request for rehearing *en banc* was made.

The jurisdiction of the District Court was invoked as to the first cause of action alleged by Krause and by Miller because the claim arises under an Act of Congress, Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 and under the equal protection and due process clauses of the United States Constitution. The jurisdiction of the District Court was invoked as to a second cause of action stated in the Amended Complaint of Krause and in the Complaint of Miller on the basis of diversity of citizenship, Krause and Miller being citizens of Pennsylvania and New York respectively and all of the defendants being citizens of Ohio.

The complaints allege facts which, if true, would establish claims under Title 42 U.S.C. §1983, and claims for wrongful death under Ohio Revised Code §5923.37, providing that no doctrine of privilege or immunity were established in bar. Respondents did not answer the complaints in either case. Instead they filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The motion to dismiss was granted by the District Court on June 2, 1971, and Krause and Miller (as well as Scheuer) separately appealed to the United States Sixth Circuit Court of Appeals. That court treated the cases together in reaching the judgment now raised for review.

Both the District Court and the United States Sixth Circuit Court of Appeals held that these damage suits against state officials, based upon alleged acts in violation of the United States Constitution and to which a state was not a party of record (and against which no monetary recovery was sought) were in substance suits against the State of Ohio itself and thereby barred by the Eleventh Amendment. In addition, the United States Sixth Circuit

Court of Appeals held that even if the case could be found as one against individuals, the defendants enjoyed the defense of absolute personal immunity or privilege, equivalent to that enjoyed by judges which could be invoked to bar any suit such as the one brought by Krause and Miller. While the District Court based its opinion in part on supposed facts contrary to the allegations of the complaints, the United States Sixth Circuit Court of Appeals went even further, elaborating a few of the facts derived from news media, and accusing the lawyers who had drafted the complaints, of deliberately attempting to deceive the courts. Neither the District Court nor the majority in the United States Sixth Circuit Court of Appeals gave any consideration to the diversity claims of these petitioners as distinguished from their claims under U.S.C. Title 42, §1983. In his comprehensive dissent Judge Celebrezze specifically noted each of the errors in the majority opinion of the United States Sixth Circuit Court of Appeals, including the neglect of the diversity claims.

REASONS FOR ALLOWANCE OF THE WRIT

I. ON A DEFENDANT'S MOTION TO DISMISS A COMPLAINT BASED SOLELY UPON THE SUFFICIENCY OF THE ALLEGATIONS OF THAT COMPLAINT, MAY A TRIAL OR APPELLATE COURT ASSUME AS TRUE FACTUAL MATTERS WHICH ARE CONTRARY TO THE ALLEGATIONS OF THAT COMPLAINT?

The first two sentences of the opinion of Judge Weick, (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 3a) writing for the majority, indicates as follows:

"The governor of Ohio called out the Ohio National Guard to suppress a riot in the City of Kent, Ohio, and on the campus of Kent State University. Two proclamations of the governor with respect thereto are appended to this opinion." (Emphasis added). (Note that the governor's proclamation regarding Kent was issued on May 5, 1970, the day after the shooting to supplement his previous proclamation of April 29, 1970, which did not mention Kent).

The concurring opinion of Judge O'Sullivan states (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, pp. 28a and 30a), that the pleadings involve:

"Extravagant conclusional allegations and some dissembling . . . obvious contrivances to get into court without pretense of fair averment of causes of action . . . clearly contrived to hide rather than disclose the true background of the involved events . . . what had been going on at Kent State and its environs preceding the tragic deaths of these young people is

so widely and publicly known across the nation that this court *may take judicial notice of such events* . . . the pleadings make no mention of the burning down of the ROTC Building on the campus of the university and the continued threat to persons and property—all a part of a state of insurrection that preceded and *continued up to the very instant of the tragedy with which we deal.*" (Emphasis added).

The trial court's opinion of Judge Connell, dismissing these actions on the pleadings states in pertinent parts as follows (at Appendix, pp. 45-46):

"The governor of Ohio had determined in *good faith* that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this court cannot substitute its position for that of the Executive of the State of Ohio . . . The purpose of this Eleventh Amendment is to enable the sovereign to act without fear of lawsuit *in preventing mob action. Quelling riot is the duty of the state, and its actions in preventing an unrestrained mob bent on violating the rights of its citizens is the act of the State of Ohio . . . The law provides that the use of the militia in time of tumult is the inherent and exclusive duty of the Executive alone . . .* (Emphasis added).

It is incredible that such blatant factual assertions are advanced by federal magistrates without the benefit of applicable sworn testimony, relying presumably instead upon presentations of this incident in the news media. Not only are these assertions legally incorrect, but they are also factually incorrect. The fact that a lawsuit arises out of a controversial incident does not warrant a radical departure from the basic rule of law that on a motion to

dismiss a complaint the allegations of that complaint must be assumed as true. The real question presented here is whether in a matter as critical in our national life as the killing and wounding of students at Kent State University on May 4, 1970, there will be no legal avenue for redress because courts of review have made findings of fact based upon news media reports. This court has condemned the undue saturation of biased news media exposure in a community where a defendant is faced with a criminal charge. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963). If juries should make their determinations based upon matters properly introduced into a court of law, without being influenced by wild media accounts, then so should judges. This case presents an outrageous record of judicial abuse, so shocking in magnitude that on this ground alone certiorari should be granted.

So that the extent of the abuse of the lower courts will be fully appreciated by this court (and at the risk of over-extending this petition for certiorari), petitioners would have this court note some of the salient conclusions drawn by the United States Department of Justice from the findings of the Federal Bureau of Investigation after an exhaustive inquiry, which conclusions were reprinted in part in the Senate Congressional Record, and which has been entirely reprinted elsewhere, as follows:

(1) "Just prior to the time the Guard left its position on the practice field, members of Troop G (107th Armoured Cavalry) were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .

The Guard was then ordered to regroup and move back up the hill past Taylor Hall."

(2) "The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistance. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded."

(3) "Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation."

(4) "We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions."

(5) "(One guardsman) admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."

(6) "Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons."

(7) "No verbal warning was given to the students immediately prior to the time the Guardsmen fired."

(8) "There was no request by any Guardsman that tear gas be used."

(9) "There was no request from any Guardsman for permission to fire his weapon."

(10) "The Guardsmen were not surrounded."

(11) "No Guardsman claims he was hit with rocks immediately prior to the firing."

(12) "There was no sniper."

(13) "The FBI has conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon."

(14) "At the time of the shooting, the National Guard clearly did not believe that they were being fired upon."

(15) "Each person who admits firing into the crowd has some degree of experience in riot control. None are novices."

(16) "A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds."

(17) "Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student."

(18) "Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

(19) "Four students were killed, nine others were wounded, three seriously. Of the students who

were killed, Jeff Miller's body was found 85-90 yards from the Guard. Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot."

(20) "Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day."

(21) No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away; another, 75 yards; another, 95 or 100 yards; another 110 yards, another 125 or 130 yards; another 160 yards, and the other, 245 or 250 yards.

(22) "Seven students were shot from the side and four were shot from the rear."

(23) "Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC building on Saturday, May 2, 1970."

(24) "As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and more were merely spectators to the confrontation."

In addition to the FBI investigation, the events at Kent State University on May 4, 1970, were extensively investigated by the President's Commission on Campus Unrest,

appointed by President Nixon on June 13, 1970. The Commission, in its report, found that the shootings at Kent were "unnecessary, unwarranted and inexcusable." Former United States Attorney General John Mitchell publicly stated his agreement with this factual conclusion of the President's Commission on Campus Unrest, commonly known as the Scranton Commission, after its chairman, Former Governor of Pennsylvania William Scranton.

How then can Judge O'Sullivan write as he did that the pleadings "make no mention of the burning down of the ROTC building on the campus of the university and the continued threats to persons and property—all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal." (Emphasis added).

As Judge Celebrezze correctly noted in his dissent (at Scheuer Appendix, U.S. Sup. Ct. No. 72-914, p. 33a):

"The majority opinion is nonetheless framed under the assumption that the violence and riotous conditions which, according to the media, may have prevailed on the Kent State Campus, have been established as proven facts for purposes of the present suits."

It should be apparent that what has occurred is a plain miscarriage of justice which has reached a posture which only this highest court can now rectify.

II. DOES THE ELEVENTH AMENDMENT BAR A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO, AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES WHILE ACTING UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983, WHICH NEITHER NAMES THE STATE OF OHIO AS A PARTY DEFENDANT, NOR SEEKS TO RECOVER ANY DAMAGES PAYABLE THROUGH THE TREASURY OF THE STATE OF OHIO OR THROUGH ANY PUBLIC FUNDS?

In his dissent, Judge Celebrezze notes as follows (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 32a):

"Indeed the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. §1983, with its requirement that defendants thereunder be shown to have acted under color of state law."

Judge Celebrezze has correctly framed the issue. The opinions of the lower courts disregard the established holding of this court in *Ex Parte Young*, 209 U.S. 123 (1908), where it was held that the immunity of a state provided in the Eleventh Amendment did not extend to a state official charged with violating the Federal Constitutional Rights of citizens. Subsequent decisions have adumbrated this principle of law, establishing that where a suit for damages does not seek recovery against public funds or against the treasury of a state, but rather seeks re-

covery only against the individual state official, such action is a suit against the individual, and not a suit against the sovereign, within the meaning of the Eleventh Amendment. See e.g., *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944). Federal circuit and district courts have rejected any such claim that the Eleventh Amendment extends to state officials against whom actions are brought analogous to the one now before this court. See e.g., *Sostre v. McGinnis*, 442 F.2d 178, 205 (2nd Cir. 1971); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *American Federation of State, County and Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *Board of Trustees of Arkansas A. & M. College v. Davis*, 396 F.2d 730 (8th Cir.), cert. denied 89 Sup. Ct. 401 (1968); *Bayer v. Chaloux*, 288 F. Supp. 366 (N.D. N.Y. 1968); *Scolnick v. Winston*, 219 F. Supp. 836, 840 (S.D. N.Y. 1963), affirmed 329 F.2d 716 (2nd Cir. 1964).

It would appear that Judge Weick attempted to extend the immunity of the Eleventh Amendment beyond its present scope, which basically limits the immunity to those actions seeking a damage recovery from a state treasury or from public funds. Judge Weick apparently would extend the Eleventh Amendment's sovereign immunity to actions against state executives which "would seriously interfere with public administration, would restrain the government from acting, and would compel it to act." (Opinion of Judge Weick, Scheuer Appendix, U.S. Sup. Ct. No. 72-914, p. 12a) Thus, the applicability of the Eleventh Amendment is to be determined by the "effect" of the suit on state officials. Where the "effect" would be too great, so as "to place a straight jacket on the state's chief executive in times of emergency so that he could not

freely exercise his discretion," the Eleventh Amendment's immunity bars such a suit.

If this extraordinary proposition is correct, then all actions under U.S.C. Title 42, §1983, would be potentially barred by the Eleventh Amendment. In actions under U.S.C. Title 42, §1983, where the defendant must have acted "under color of state law", it is obvious that most defendants are likely to be state officials. In some sense, every action under U.S.C. Title 42, §1983, "affects" a state, because a state is nothing more than those state officials who act for it. Thus, a suit against any state official is in some degree going to "affect" that state. The question raised then is whether U.S.C. Title 42, §1983 is unconstitutional because it violates the Eleventh Amendment. Who is to say when the state will be sufficiently "affected" by the lawsuit against state officials so that the Eleventh Amendment's immunity should apply? This reasoning, which radically departs from previous authorities of this court, effectively emasculates the Civil Rights Act of 1871, which was specifically designed by Congress to provide redress for violations of the rights of citizens under the Fourteenth Amendment. It is the very situation which arose at Kent where a peaceful gathering of students was violently and unlawfully broken up by the excessive use of force by state officials, that the Civil Rights Act of 1871 was designed to remedy. The officials and executives of a state should not "freely exercise their discretion" where such "freedom" amounts to a license to wantonly kill and maim innocent students. The Civil Rights Act of 1871 was designed to limit the free exercise of discretion by state officials, at least to bounds set by the Fourteenth Amendment. It would seem that the Eleventh Amendment is at minimum qualified by the subsequent passage of the Four-

teenth Amendment with respect to the rights of due process of law and equal protection of the laws.

The decision below disregards the established rulings of this court, and raises profound questions which command the review of this court.

III. DOES ANY DOCTRINE OF EXECUTIVE IMMUNITY BAR A DAMAGE ACTION AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD ACTING IN THEIR INDIVIDUAL CAPACITIES, INDIVIDUALLY AND IN CONSPIRACY, UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983?

Judge Weick reasoned in his majority opinion that "since the courts have granted themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the executive." (Emphasis added). (Opinion of Judge Weick, Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 12a). As Judge Celebrezze pointed out in his dissent, this "extension" amounts to "an ad hoc application of the Eleventh Amendment . . ." As the dissent further points out, the opinion of the majority "in effect constitutes judicial repeal of an Act of Congress . . ." (Opinion of Judge Celebrezze, Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 32a).

Let there be no mistake about it, the majority opinion of Judge Weick unabashedly departs from established law. Judge Weick feels that there is no reason why the abso-

lute immunity possessed by courts should not be "extended" to the executive. Thus, the decision of the lower court compels review by this court, insofar as this departure flies in the teeth of numerous holdings to the contrary. See e.g., *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), cert. granted in part sub nom. *District of Columbia v. Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Sostre v. McGinnis*, 442 F.2d 178, 205 n. 51 (2nd Cir. 1971 (en banc)); *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1965); *Birnbaum v. Trussel*, 347 F.2d 86 (5th Cir. 1965); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968); *Jones v. Per-rigan*, 459 F.2d 81 (6th Cir. 1972); *Meredith v. Allen County War Memorial Hospital Ass'n.*, 397 F.2d 33 (6th Cir. 1968); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

The decision of the lower courts is contrary to the decision of this court in *Sterling v. Constantin*, 287 U.S. 378 (1932). There it was held that the actions of a state governor were subject to review where there was a claim that the action of the governor in calling out National Guard troops in Texas to seize and control privately owned oil wells in order to impose production restrictions was illegal. In *Moyer v. Peabody*, 212 U.S. 78 (1909) (also like *Sterling* involving a governor attempting to order actions of the National Guard); this court was not confronted with any claim that the governor's conduct was in bad faith, or that his conduct was not directed toward the quelling of the claimed insurrection. Both parties agreed that the arrest and detention of Moyer were undertaken in good faith in the face of an actual insurrection. Thus, the reliance upon *Moyer, supra*, by the lower court is incorrect,

because this case does not present allegations admitting any good faith by the governor of Ohio or other defendants, or admitting the appropriate use of force directed toward the quelling of an insurrection. The allegations of the complaint—though assumed otherwise by the reviewing courts—do not admit good faith or a reasonable necessity for quelling any mob, riot or violence. The only way that this case might be brought within the ambit of *Moyer, supra*, is by literally disregarding the allegations of the complaint, and by changing them to suit the facts “found” by the reviewing magistrates contrary to the allegations of the complaint. This is precisely what has taken place in the lower courts.

Thus, it is clear that the new “extension” heralded by the lower court requires review on the merits, since it so plainly flaunts the present law.

IV. WHERE CITIZENS OF PENNSYLVANIA AND NEW YORK BRING DAMAGE ACTIONS IN FEDERAL COURT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD, THESE DEFENDANTS ALL BEING CITIZENS OF OHIO, FOR COMMITTING INDIVIDUALLY AND IN CONSPIRACY THE WANTON KILLING OF INNOCENT STUDENTS ON A COLLEGE CAMPUS, AND WHERE AN OHIO STATUTE (OHIO REVISED CODE §5923.37) SPECIFICALLY PROVIDES FOR LIABILITY UNDER SUCH CIRCUMSTANCES, DOES A FEDERAL COURT HAVE JURISDICTION BASED UPON THE DIVERSITY OF CITIZENSHIP OF THE PARTIES?

Judge Celebrezze in his dissent writes as follows (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 68a):

“Without having heard evidence respecting the allegations of intentional willful and wanton misconduct, the District Court could not properly dismiss the wrongful death actions as against these defendants-appellees.

I therefore believe that the District Court erred in dismissing the wrongful death actions set forth in the Krause and Miller complaints, which were before the court under its original, diversity jurisdiction. These actions are not barred by the Eleventh Amendment.”

Judge Celebrezze's reasoning is the only reasoning with respect to the diversity basis of jurisdiction, since neither Judge Weick nor Judge O'Sullivan dealt with the issue at all.

However, it would seem that there would be diversity jurisdiction where a state statute provides as does Ohio Revised Code §5923.37, as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area *unless the act is one of willful or wanton misconduct.*" (Emphasis added).

The allegations of the pleadings bring this action within Ohio Revised Code §5923.37. This statute supercedes and waives any immunity otherwise available to the State of Ohio. It creates a cause of action such as the one alleged in the pleadings in this case. The basis of jurisdiction in this instance is not premised upon the existence of a federal question, but rather is premised upon the existence of a state statute providing for redress in a given situation. Where there exists diversity of citizenship of the parties, an action may be brought in federal court upon a state claim. Such an action as in this case is not barred by the Eleventh Amendment, where the state law clearly provides for liability of individuals, namely "members" of the organized militia. This serves to emphasize how strained it is for the lower court to assert that these actions are being brought against the sovereign, and not against individuals. The state law itself provides for these actions in its own courts against individuals. The federal court has an obligation to recognize state law in this regard. Moreover, there is no state sovereign immunity which would immunize members of the organized militia from liability. This is not a suit against the State

of Ohio as an entity, claiming damages recoverable from the state treasury, as in *Krause, Admr. v. State of Ohio*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972). Moreover, to the extent that Ohio seeks to claim sovereign immunity (assuming *arguendo* that the present action were against the State of Ohio), the application of the doctrine of sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf. the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause Admr. v. State of Ohio, supra*.

For these reasons, the lower court should not have altogether disregarded the diversity basis of jurisdiction, and this court should review on the merits the issue raised by the action of the lower courts in this regard.

V. IS THE UNITED STATES A NECESSARY PARTY IN A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES ALLEGING THAT THESE DEFENDANTS, ACTING INDIVIDUALLY AND IN CONSPIRACY UNDER COLOR OF STATE LAW, COMMITTED INTENTIONAL DEPRIVATIONS OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983?

Judge Weick, writing for the majority below, asserted as follows (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 19a):

"It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12(b) and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the training and weaponry of the guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the court. The United States has not consented to be sued."

This holding of Judge Weick is erroneous. The United States is not a necessary party based upon the plain allegations of the complaint. Simply because the United States was "involved" in the training of the National Guard and their use of weaponry does not necessitate that the United States be named as a defendant. We are here

dealing with the alleged misconduct of state officials acting under color of state law. There is absolutely no allegation relating to involvement of federal officials. Moreover, as contended in the preceding section, with respect to the State of Ohio, any bar to this action premised upon the failure of the United States to consent to suit violates the due process and equal protection clauses of the Fourteenth Amendment.

Inasmuch as the lower court in part premised its holding on the necessity of the United States as a party defendant, a conclusion altogether unjustified by the allegations, this court should review the matter on its merits.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the U.S. Sixth Circuit Court of Appeals.

Respectfully submitted,

STEVEN A. SINDELL

JOSEPH M. SINDELL

SINDELL, SINDELL, BOURNE, STERN & SPERO

1400 Leader Building

Cleveland, Ohio 44114

(216) 781-8700

Attorneys for Petitioners, Elaine B.

Miller and Arthur Krause

JOSEPH KELNER

KELNER, STELLJES & GLOTZER

217 Broadway

Suite 600

New York, New York 10007

Attorney for Petitioner, Elaine B.

Miller

APPENDIX

OPINION OF THE COURT OF APPEALS

(Filed November 17, 1972)

Nos. 71-1622-23-24

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 71-1622

ARTHUR KRAUSE, Administrator of the Estate of
ALLISON KRAUSE, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio, *et al.*,
Defendants-Appellees.

No. 71-1623

ELAINE B. MILLER, Administratrix of the Estate of
JEFFREY GLENN MILLER, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, individually and as Governor of the
State of Ohio, *et al.*,
Defendants-Appellees.

No. 71-1624

SARAH SCHEUER, Administratrix of the Estate of
SANDRA LEE SCHEUER, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio, *et al.*,
Defendants-Appellees.

APPEALS FROM UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Note: The Opinion of the Court of Appeals is appended to the Petition for Writ of Certiorari in the case of Sarah Scheuer v. James Rhodes, et al., United States Supreme Court Case No. 72-914, at pp. 1a-69a, with permission of the Clerk of the United States Supreme Court is incorporated herein by reference.

**JUDGMENT OF COURT OF APPEALS
IN KRAUSE CASE**

(Filed November 17, 1972)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 71-1622

ARTHUR KRAUSE, Administrator of the estate of Allison
Krause, deceased,
Plaintiff-Appellant,

v.

GOVERNOR JAMES RHODES, **SYLVESTER DEL CORSO** and
ROBERT CANTERBURY,
Defendants-Appellees.

Before: **WEICK** and **CELEBREZZE**, Circuit Judges and
O'SULLIVAN, Senior Circuit Judge

JUDGMENT

APPEAL from the United States District Court for the
Northern District of Ohio.

THIS CAUSE came on to be heard on the record from
the United States District Court for the Northern District
of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

**JUDGMENT OF COURT OF APPEALS
IN MILLER CASE**

(Filed November 17, 1972)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 71-1623

ELAINE B. MILLER, Administratrix of the Estate of Jeffrey
Glenn Miller, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, individually and as Governor of the State
of Ohio, **SYLVESTER DEL CORSO**, **ROBERT CANTERBURY**, **HARRY
D. JONES**, **JOHN E. MARTIN**, **RAYMOND J. SPR**, **ALEXANDER
STEVENSON** and **VARIOUS OFFICER AND ENLISTED MEN** true
names presently unknown, being members of G. Company,
107th Armored Cavalry Regiment and A Company, First
Battalion, 145th Infantry Regiment of the Ohio National
Guard, and **Robert White**,
Defendants-Appellees

Before: **WEICK** and **CELEBREZZE**, Circuit Judges, and
O'SULLIVAN, Senior Circuit Judge

JUDGMENT

APPEAL from the United States District Court for the
Northern District of Ohio.

THIS CAUSE came on to be heard on the record from
the United States District Court for the Northern District
of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

**ORDER OF COURT OF APPEALS DENYING
PETITION FOR REHEARING**

(Filed January 3, 1973)

Nos. 71-1622 and -1623

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 71-1622

**ARTHUR KRAUSE, Administrator of Estate of
Allison Krause, Deceased,
Plaintiff-Appellant**

VS

**JAMES RHODES, Governor, et al,
Defendants-Appellees**

No. 71-1623

**ELAINE B. MILLER, Administratrix of Estate of
Jeffrey Glenn Miller, Deceased,
Plaintiff-Appellant**

VS

**JAMES RHODES, etc., et al,
Defendants-Appellees**

ORDER

Before WEICK and CELEBREZZE, Circuit Judges, and
O'SULLIVAN, Senior Circuit Judge.

A majority of the active Judges of this Court having
voted against an en banc hearing, the petition for rehear-
ing was considered by the panel, and it is hereby denied.

Judges Edwards and Celebrezze voted in favor of an en banc hearing. Judge Celebrezze dissented from the order of the panel denying the petition for rehearing.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk

MEMORANDUM AND ORDER OF DISTRICT COURT

(Filed June 2, 1971)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

ARTHUR KRAUSE, Administrator of
the Estate of ALLISON KRAUSE, de-
ceased

Plaintiff,

v.

GOVERNOR JAMES RHODES, et al.,

Defendants.

Civil Action No.
C 70-544

ELAINE B. MILLER, Administratrix of
the estate of JEFFREY GLENN MIL-
LER, deceased,

Plaintiff,

v.

JAMES RHODES, et al.,

Defendants.

Civil Action No.
C 70-816

SARAH SCHEUER, Administratrix of
the Estate of SANDRA LEE SCHEUER,
deceased,

Plaintiff,

v.

JAMES RHODES, et al.,

Defendants.

Civil Action No.
C 70-859

MEMORANDUM AND ORDER

CONNELL, J.

Before this court are defendants' motion to dismiss in the above-captioned cases. In *Krause v. Rhodes*, juris-

diction is predicated upon 42 U.S.C. 1983, for violation of Equal-Protection and Due Process guaranteed under the United States Constitution, and under 28 U.S.C. Sections 1331 and 1334.

This action maintains that "all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio", to violate the plaintiffs' rights to Equal Protection of the Law and Due Process of Law guaranteed under the United States Constitution."

The complaint of *Elaine B. Miller, Administratrix v. James Rhodes, et al.*, also alleges jurisdiction under 42 U.S.C. Section 1983 for seeking "redress for the deprivation under color of state law of the life of Jeffrey Glenn Miller, his rights, privileges, and immunities secured by the Constitution of the United States."

The action filed by *Sarah Scheuer v. James Rhodes, et al.*, alleges violation of 42 U.S.C. Section 1983 seeking "redress of deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States."

In reading the complaints in these three cases, the alleged incidents all took place at the same time under the same circumstances arising out of a confrontation between Ohio National Guard troops and students on the campus of Kent State University on May 4, 1970. In reading the complaint further, it is pointed out that all plaintiffs, except Sarah Scheuer, are residents of states other than Ohio and all defendants are residents of the State of Ohio. These cases, being exact in allegations, jurisdiction being predicated upon Section 1983 in all cases, the defendants being the same, with few inconsequential excep-

tions, and the events allegedly having taken place at the same time, this Court shall rule on all the motions to dismiss at this time in this memorandum and order.

The defendant, James Rhodes, Governor of the State of Ohio, maintains that in all three actions that this Court lacks jurisdiction over the defendant in his representative capacity as a public official and agent of the sovereign State of Ohio, since this action is essentially against the State of Ohio, and no waiver of its constitutional right to sovereign immunity has been granted. Further, Governor James Rhodes maintains that nowhere in the plaintiffs' complaint does an allegation appear that any negligent, wilful or wanton act was committed by Governor James Rhodes.

The defendants, Adjutant General Sylvester Del Corso and Brigadier General Robert Canterbury, both of the Ohio National Guard, motion to dismiss the complaints in the three above-captioned cases before this court, and Robert White, President of Kent State University seeks dismissal in two of the cases, C 70-816 and C 70-859; this defendant not having been named in C 70-544. These defendants maintain that they are sued in their representative capacities as public officials and agents of the sovereign State of Ohio, and this complaint being brought against them in their representative capacities in a suit against the State of Ohio, and that this State having not consented to the suit, sovereign immunity prevents the plaintiffs from bringing this action.

The defendants, Major Harry D. Jones, Captain Raymond J. Srp and Captain John E. Martin, and all officers and men in the Ohio National Guard, also move this court for a dismissal of the complaint in civil actions C 70-816 and C 70-859, maintaining that the court lacks jurisdiction

over the subject matter. These defendants claim that they are being sued in their representative capacities as military officers and agents of the sovereign State of Ohio, and that the complaint is one in which the State of Ohio is primarily concerned and the state not having waived sovereign immunity, the case must be dismissed.

The National Guard is authorized by Ohio law under Section 5923.01 et seq., of the Ohio Revised Code. The duties of the Governor with respect to the use of the state militia are expressed in Section 5923.21 of the Ohio Revised Code. This statute gives the Governor of Ohio the power to order the organized militia into service to:

"aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

Further, Section 5923.22 of the Ohio Revised Code enables the Governor to order the

"commanding officer of any regiment, battalion, company, troop or battery of the organized militia, to order his command or part thereof"

into service

"to act in aid of the civil authorities"

when there is

"tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property or by force or violence break or resist the laws of the state."

Section 5923.37 of the Ohio Revised Code provides immunity for members of the state militia

"when a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

The Eleventh Amendment to the United States Constitution states that:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state."

The United States Supreme Court stated in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933), that;

"The Eleventh Amendment is an explicit limitation of the judicial power of the United States . . . (quoting the Eleventh Amendment) . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.' *Ex parte New York*, 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans v. Louisiana*, 134 U.S. 1, 10; *Palmer v. Ohio*, 248 U.S. 32, 34; *Duhne v. New Jersey*, 25 U.S. 311, 313, 314."

In the case of *Ford Motor Co. v. Department of Treasury of Indiana, et al.*, 323 U.S. 459 (1945), the Supreme Court again affirmed the law in *Fiske* and stated:

"the express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent."
(Citations omitted.)

In *Fitts v. McGhee*, 172 U.S. 516 (1898), the court reaffirmed the Eleventh Amendment prohibition of court interference with a state's sovereignty in a lawsuit brought by a citizen of the state. The court in the *Louisiana v. Jumel*, 107 U.S. 711 (1882), decision affirmed the sovereignty of a state in an unconsented lawsuit brought by a citizen of another state. These stated principles were reaffirmed by the Supreme Court in *Parden v. Terminal Railway of the Alabama State Docks Department, et al.*, 377 U.S. 184, 106 (1964). The Court in deciding whether a waiver of immunity had taken place stated clearly;

"Nor is a state divested of its immunity on the mere ground that the case is one arising under the Constitution or laws of the United States."

In *Fowler v. United States*, 258 F.Supp. 638 (D.C. Cal. 1966), the court in interpreting sovereign immunity and Sections 1981, 1985, and 1988 prohibited any use of these sections as a basis of civil actions against public officers acting in their official capacities in good faith and in pursuance of federal or state law.

The case of *Tenny v. Brandhove*, 341 U.S. 367 (1951); involving a suit for damages brought in federal district court against the defendants; members of a state legislature fact finding committee. The Court in reviewing this action affirmed immunity of legislators acting within

their official capacities and affirmed the district court's dismissal of the complaint stating on page 377;

"The claim of an unworthy purpose does not destroy the privilege . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive."

In *Kenny v. Killian*, 137 F. Supp. 571, 578 (W.D. Mich. 1955), the court also reviewing Section 1983 stated;

"Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities in good faith and in pursuance of State law."

See also *Copley v. Sweet*, 133 F. Supp. 502, 509 (W.D. Mich. 1955).

The basis for this principle is to permit those whose position in government compels action to proceed without hesitation in the "constant dread of retaliation." See *Gregorie v. Biddle*, 177 F.2d 579, 581 (C.A. 2nd 1949), *Bradley v. Fisher*, 13 Wall. 334; *Randall v. Brigham*, 7 Wall. 523, *Spaulding v. Vilas*, 161 U.S. 483.

The policy for affording this immunity to public officials, is further stated in *Fowler*, *supra*, and *Gregorie*, *supra*, these cases being federal officials; the *Fowler* court said of page 646,

"The well established principles of law summed up in the phrase, 'doctrine of sovereign immunity', stands as

an unalterable and impregnable barrier between plaintiff and any injunctive relief against this defendant."

In *Gregorie, supra*, Judge L. Hand also stated on page 580;

"The immunity is absolute and is grounded on principles of public policy."

In *Dunn v. Estes*, 117 Supp. 146 (1953), the district court held that Section 1983 does not destroy the immunity of public officials acting in the performance of their official duties. In *Fowler, supra*, 646, the court does not acknowledge "persons" as used in 42 U.S.C. Section 1983 as including a "state or its governmental subdivision, acting in its sovereign, as distinguished from its proprietary, capacity." The State while acting in its sovereign capacity is not included within the purview of Section 1983, Title 28 U.S.C. See *Hewitt v. City of Jacksonville*, 188 F.2d 423 (1951), cert. den. 342 U.S. 835 (1951). The state subdivisions, city and county, are not a "person" within the meaning of Section 1983 and are immune from liability. *Sires v. Cole*, 320 F.2d 877 (1963); *Monroe v. Pape*, 365 U.S. 167 (1960).

The plaintiffs may not avoid sovereign immunity by naming individuals rather than the political division itself. In *Great Northern Ins. Co. v. Read*, 328 U.S. 47, 51 (1943), the Supreme Court stated;

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (citations omitted) . . . A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment."

In *Ford Motor Co. v. Department of Treasury of Indiana, supra*, 464, the Court said:

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

The plaintiffs have cited cases where Section 1983 has been used as a basis for recovery against public officials. In *Monroe v. Pape, supra*, the Supreme Court permitted the use of Section 1983 as a basis for recovery against police officers for alleged violations of an individual's Fourteenth Amendment rights. The Court in this instance determined that sufficient allegations of "an officials abuse of his position" were presented.

In *Moyer v. Peabody*, 212 U.S. 78 (1909), Mr. Justice Holmes affirmed the order of a federal court in Colorado dismissing a lawsuit filed against the Governor of Colorado, the Adjutant General of the National Guard of that state, and a captain of a company of the militia, pursuant to R.S. Section 1979, 42 U.S.C. Section 1983, for alleged violations of the plaintiffs' Fourteenth Amendment rights. The governor in this case declared a county to be in a state of insurrection and called out the National Guard to suppress the trouble. In the course of controlling the outbreak, the plaintiff was arrested as a leader of the tumult and detained until he could be released with safety and turned over to the civil authorities and dealt with according to law. In upholding the Governor's actions, the High Court stated on page 85;

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief . . . Public danger warrants the substitution of executive process for judicial process. See

Keely v. Sanders, 99 U.S. 441, 446 . . . It is enough that in our opinion the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.' " See *Dow v. Johnson*, 100 U.S. 158.

The members of the Ohio National Guard are agents of the State of Ohio while acting in their official capacities. This definition of the law was affirmed in *Maryland, et al. v. United States*, 38; U.S. 41 (1965). In this instance the Court defined the state militia as being state employees. U.S. Const., Art. I, Section 8, cl. 15 and 16.

Furthermore, the law of the State of Ohio, Section 2923.55 of the O.R.C., holds all law enforcement officers and members of the organized militia guiltless for their acts in suppressing riot when such order to cease and desist has been issued pursuant to O.R.C. 2923.51.

The State of Ohio has established Kent State University pursuant to Section 3341.01 of the Ohio Revised Code. The board of trustees of this university, with the advice and consent of the senate, are responsible for the governing of this institution pursuant to Section 3341.02 of the Ohio Revised Code. Authorization is given to the trustees of the institution pursuant to Ohio Revised Code, Section 3341.01 to;

"Do all things necessary for the proper maintenance and successful and continuous operation of such universities."

Individuals may not maintain an action against a sovereign where consent has not been obtained. See *Palmer v. Ohio*, 248 U.S. 32 (1918) and also Article I, Section 16 of the Ohio Constitution as interpreted in *Randabough v. State*,

96 Ohio St. 513 (1916); *State ex rel. Williams v. Colonder*, 148 Ohio St. 188, (1947); *Wolfe v. Ohio State University Hospital*, 170 Ohio St. 49 (1959).

In *Corbean v. Xenia City Board of Education*, 386 F.2d 480 (C.A. 6th, 1966) the court affirmed the dismissal of a tort action brought in federal court against a local school board and stated;

"It is the law of Ohio that a school board, when discharging a governmental function, is protected from tort liability by the doctrine of sovereign immunity. (citations omitted) . . . The decisions of the Ohio Courts in this litigation reaffirm the adherence to the doctrine of sovereign immunity, and found it applicable here. We follow Ohio law in this tort action unless such law offends federal law or the United States Constitution. *Erie R.R. v. Tomkins*, 304 U.S. 64, (1938); *Williams v. Kaiser*, 323 U.S. 471, (1945); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, (1940)."

As stated in *Moyer*, *supra*, p. 83,

"It is admitted as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of the fact . . ."

And in Justice Holmes comparison of a Governor to the Captain of a ship, the Court said on page 85;

"But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. (citations omitted)."

The Eleventh Amendment to the United States Constitution prohibits a suit by an individual of another state against one of the United States.

The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it.

The purpose of this Eleventh Amendment is to enable the sovereign to act without fear of lawsuit in preventing mob action. Quelling riot is the duty of the state, and its actions in preventing an unrestrained mob bent on violating the rights of its citizens is the act of the State of Ohio.

This court is mindful of the circumstances where individual officials of a state or its subdivisions have abused their power under color or law giving rise to an action under Section 1983.

The existence of riot is determined by the Governor, and when so determined, the use of the militia in discharging the executive function of law enforcement is the inherent right and duty of the sovereign.

All the individuals of the militia acting in their duties pursuant to the orders of the Governor of the State of Ohio are acting within the sovereign's capacity to enforce the law, and the Eleventh Amendment right to immunity applies to each individual acting in this capacity.

This court holds that the actions of Governor James Rhodes in calling out the National Guard pursuant to the proclamation issued was the decision of the Executive, and this federal court is without jurisdiction to review.

The law provides that the use of the militia in time of tumult is the inherent and exclusive duty of the executive alone. In this instant case, there has been no recital of any claimed factual situation tending to substantiate the plaintiffs' allegations that an abuse of this duty existed, or that conspiracy actually existed in the slightest degree between any of the defendants so named in the complaints.

The Eleventh Amendment to the United States Constitution prohibits this court from exercising jurisdiction in this case and this court so finds.

All defendants, including President White, are sued in their official capacities and sovereign immunity so extends.

The above-captioned cases are dismissed as to all defendants.

The complaints in cases C 70-544, C 70-816 and C 70-859 are dismissed at plaintiffs' cost.

IT IS SO ORDERED.

/s/ JAMES C. CONNELL, Judge
United States District Court

DATED JUNE 2nd, 1971.

AMENDED COMPLAINT IN KRAUSE CASE

(Filed July 6, 1970)

Civil Action No. C 70-544

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**AMENDED COMPLAINT FOR DAMAGES UNDER
UNDER U.S.C. TITLE 42, SECTION 1983, AND
FOR WRONGFUL DEATH**

A Jury Trial is Demanded

FIRST CAUSE OF ACTION

1. Plaintiff Arthur Krause is a citizen of the United States who resides in Churchill Borough, Pennsylvania, and is the only qualified, appointed and acting Administrator of the Estate of Allison Krause.

2. Allison Krause, plaintiff's decedent, was at all times hereinmentioned the daughter of plaintiff Arthur Krause, and plaintiff's decedent was at all times hereinmentioned a citizen of the United States, and was an enrolled student at Kent State University.

3. Defendant Governor James Rhodes at all times hereinmentioned was the Governor and Chief Executive of the State of Ohio and the Ohio National Guard was under his command, authority, and control.

4. At all times hereinmentioned defendant Sylvester Del Corso was the Adjutant General of the Ohio National Guard, which is the military force of the State of Ohio.

5. Defendant Robert Canterbury was at all times hereinmentioned the Brigadier General and Assistant Adjutant General of the Ohio National Guard and was in direct command and control of the national guardsmen in question at the time of the occurrence referred to hereinafter.

6. This action arises under United States Code Title 42, Section 1983, and under the United States Constitution, which guarantees to all citizens Equal Protection of the Laws and Due Process of Law.

7. At all times hereinmentioned all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

8. On or about May 4, 1970, defendants individually and jointly ordered units of the Ohio National Guard onto the Campus of Kent State University, which is an educational institution operated and controlled by the State of Ohio, and which is located in Portage County, in the State of Ohio.

9. Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

- (a) Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place; and
- (b) Defendants knew said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and
- (c) Defendants knew that the presence of such troops, so improperly trained, and so armed, under the

circumstances created an unreasonable danger on the campus of Kent State University, creating an imminent risk of injury and death to all students then on the campus, including plaintiff's decedent, Allison Krause.

10. The ordering of these improperly trained and armed troops onto the Kent State Campus, on the part of these defendants in complete and utter indifference and disregard for the lives of students on the Kent State Campus, including plaintiff's decedent Allison Krause, constituted culpable, gross, wanton and reckless misconduct under the circumstances and arbitrarily, discriminatorily and capriciously deprived plaintiff and plaintiff's decedent of their rights to Equal Protection of the Laws and Due Process of Law guaranteed under the United States Constitution.

11. On the afternoon of May 4, 1970, a group of students gathered together on the campus of Kent State University. Plaintiff's decedent, Allison Krause, was present at or near the gathering of students but at no time did she engage in any provocation or form of violence towards any individual or national guardsman. At the time, the national guardsmen, as described above, under the command of defendant Robert Canterbury were present on the Campus. Suddenly and without warning and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, intentionally, willfully, wantonly and maliciously disregarding the lives and safety of students, spectators, passers-by, and other individuals lawfully on the campus, including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, from which wound she eventually died, thereby depriving her of her

life without Due Process of Law, and in violation of her right to Equal Protection of the Laws. At no time did defendant Robert Canterbury take any action whatsoever to prevent his troops from so conducting themselves, and such failure under the circumstances then and there existing was an intentional act committed in willful, wanton, reckless and callous disregard and indifference for the lives of civilians present on the Campus of Kent State University, including plaintiff's decedent, Allison Krause.

12. All acts hereinmentioned were done individually and in conspiracy by these defendants and by other unknown persons with the specific intent of depriving plaintiff and plaintiff's decedent of their rights to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

13. Plaintiff says that he and his family suffered great grief and distress as the result of the wrongful death of his daughter, who herself suffered conscious pain prior to her death, and that he and other beneficiaries had an interest in the life of the decedent, Allison Krause.

SECOND CAUSE OF ACTION

1. By this reference plaintiff incorporates all of the allegations of the First Cause of Action as thought those allegations were fully set forth herein at this point.

2. For this Second Cause of Action, plaintiff says that he is a citizen of the State of Pennsylvania, and that defendants are all citizens of the State of Ohio, and that this Court has jurisdiction of this Second Cause of Action by virtue of the diversity of citizenship of the parties.

3. Defendants ordered troops which they knew, or in the exercise of ordinary care should have known, were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

- (a) Defendants knew, or in the exercise of ordinary care should have known, that there was no cause, or insufficient cause, for sending armed troops at said time into said place; and
- (b) Defendants knew, or in the exercise of ordinary care should have known, that said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and
- (c) Defendants knew, or in the exercise of ordinary care should have known, that the presence of such troops, so improperly trained, and so armed, under the circumstances created an unreasonable danger on the Campus of Kent State University, creating an imminent risk of injury and death to all students then on the Campus, including plaintiff's decedent, Allison Krause.

4. The ordering of these improperly trained and armed troops onto the Kent State Campus on the part of these defendants was negligent and careless, and the negligence and carelessness of these defendants as hereinabove alleged directly and proximately caused the wrongful death of plaintiff's decedent, Allison Krause.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for compensatory damages in the sum of ONE MILLION DOLLARS (\$1,000,000.00), together with the costs of this action.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for punitive damages in the sum of FIVE MILLION DOLLARS (\$5,000,000.00), together with the costs of this action.

/s/ STEVEN A. SINDELL

SINDELL, SINDELL, BOURNE, MARKUS,
STERN & SPERO
1400 Leader Building
Cleveland, Ohio 44114
781-8700

COMPLAINT IN MILLER CASE

(Filed August 24, 1970)

Civil Action No. C 70-816

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

COMPLAINT

Plaintiff Demands Trial by Jury

Plaintiff, ELAINE B. MILLER, by her attorney, JOSEPH KELNER and associate attorney, ABRAHAM D. SOAFER, for her complaint herein, alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a citizen of the State of New York, residing at 261-71 Langston Avenue, Borough of Queens, City of New York and is the duly appointed administratrix of the estate of JEFFREY GLENN MILLER, plaintiff's son, who died on May 4, 1970 at the age of 20, by reason of the

actions of the defendants as hereinafter stated; plaintiff has been appointed administratrix of the estate of **JEFFREY GLENN MILLER** by the Surrogate's Court, Queens County, New York.

2. At all times herein mentioned, defendant **RHODES** was Governor of the State of Ohio and exercised certain powers and authority individually and as Governor of the State of Ohio and under color of the laws of the State of Ohio, as its agent, servant and employee.

3. At all times herein mentioned, the defendants, **DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, STEVENSON** and the various officers and enlisted men of Troop G, G Company, 107th Armored Cavalry Regiment of the Ohio National Guard and A Company, First Battalion, 145th Infantry Regiment of the Ohio National Guard, were on active duty with the Ohio National Guard as officers and enlisted men therein and were acting under color of the laws of Ohio.

4. At all times herein mentioned, the defendant, **WHITE**, was President of Kent State University at Kent, Ohio and exercised his powers and authority in such employment and under color of the laws of Ohio.

5. At all times mentioned herein, **JEFFREY GLENN MILLER** was a full time student at Kent State University; and on May 4, 1970 the said **JEFFREY GLENN MILLER** was shot and killed by a bullet fired by one of the members of the Ohio National Guard in service on the campus at Kent State University; and at the time he was shot the said **JEFFREY GLENN MILLER** was not engaged in any riotous, aggressive, criminal, improper or provocative acts and was not contributorily negligent in causing his death.

6. This court has jurisdiction pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1331 and 1343 in that plaintiff's cause of action seeks redress for the deprivation under color of state law, of the life of JEFFREY GLENN MILLER, his rights, privileges and immunities secured by the Constitution of the United States, and it arises under Federal law, with the matter in controversy exceeding \$10,000 exclusive of interest and costs.

7. At all times mentioned herein, Kent State University was a state university of Ohio, organized pursuant to the laws of Ohio and had its main campus in the City of Kent, Portage County, Ohio.

8. At all times mentioned herein on May 4, 1970 and prior thereto, the defendants, acting individually and in concert with each other and under color of the laws of the State of Ohio, subjected and caused the said JEFFREY GLENN MILLER to be subjected to the deprivation of his life, his rights, privileges and immunities secured by the Constitution and laws of the United States; that such deprivation was without due process of law in that, by reason of the defendants' actions on May 4, 1970 and prior thereto, plaintiff's decedent, JEFFREY GLENN MILLER, was shot and killed on May 4, 1970 by a bullet fired by one of the aforesaid National Guard members on duty on the campus of Kent State University; and the defendants intentionally, recklessly, willfully and wantonly engaged in the following acts among other things which caused or contributed to the causing of the deprivation alleged herein; that they used and fired live ammunition with the intent to kill JEFFREY GLENN MILLER and other students lawfully upon the said campus; that the officers of the said National Guard ordered the use of said live ammunition

and, upon information and belief, gave the orders to fire the same at the said time and place; that they thereby caused the death of the said JEFFREY GLENN MILLER; that by reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER, and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million (\$2,000,000) dollars and punitive damages in the amount of (\$2,000,000) dollars against all of the defendants.

AS AND FOR A SECOND CAUSE OF ACTION

9. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs (1) through (8) with the same force and effect as if fully set forth herein.

10. That all of the defendants were reckless, careless and negligent in their failure to take precautions to avoid the occurrence of such shooting; in permitting the use of firearms under the existing circumstances; in permitting the said firearms to be loaded with live ammunition under circumstances not justifying such use; in authorizing and permitting the use of illegal and excessive force and violence in relation to the situation prevailing upon the Kent State campus at such time; in the failure to order and prevent troops of the Ohio National Guard from firing live ammunition at unarmed persons thereat under such or similar circumstances without legal justification; in failure to require the establishment and promulgation of proper rules, regulations and standards which would prohibit the unauthorized use and firing of firearms where the same was unjustified; in the promulgation of rules, regulations and training procedures applicable to civil disturbances

which were vague, indefinite and confusing and which authorized and permitted troops to use firearms within their own discretion and without proper standards, safeguards, orders or training prohibiting such improper use of firearms; in the failure to establish and conduct proper training procedures to prevent the happening of such an occurrence; in providing improper and insufficient training of troops for duty under such circumstances; in creating an unreasonable and imminent risk of injury and death to students upon the campus, including JEFFREY GLENN MILLER; and all of the defendants were otherwise reckless, careless and negligent.

11. On May 4, 1970 various officers and enlisted men intentionally and without just cause or provocation, fired intentionally at the said JEFFREY GLENN MILLER and others with intent to kill, causing the death of JEFFREY GLENN MILLER on the campus of Kent State University, in violation of the statutes and laws in such cases made and provided.

12. By reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER, and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million (\$2,000,000) dollars and punitive damages in the amount of (\$2,000,000) dollars against all of the defendants.

WHEREFORE, plaintiff prays for judgment against all of the defendants jointly and severally for compensatory damages in the amount of two million (\$2,000,000) dollars and punitive damages in the amount of two million (\$2,-

000,000) dollars, together with the costs and disbursements of this action.

/s/ STEVEN A. SINDELL

/s/ JOSEPH KELNER

Attorney for Plaintiff

217 Broadway

New York, New York 10007

(212) 233-7890

TABLE OF CONTENTS

	Page
Citations	1
Brief of Other Respondents Adopted	2
Questions Presented	2
Reasons for Denying the Writ	3
1. The Eleventh Amendment	3
2. Executive Immunity	5
3. Application of Rule 8, Federal Rules of Civil Procedure	7
4. Reviewability by Federal Courts of a Governor's Determination of Need to Call Out Units of the National Guard	8
5. National Guardsmen as Agents of the State	10
6. Intervening Cause	11
Conclusion	12
Affidavit of Service	12

CITATIONS

<i>Baker v. Carr</i>, 369 U.S. 186 (1962)	8
<i>Cherokee Nation v. Georgia</i>, 5 Pet. 1 (1831)	8
<i>Coleman v. Miller</i>, 307 U.S. 433 (1938)	8
<i>Ex Parte Young</i>, 209 U.S. (1908)	3
<i>Ford Motor Company v. Treasury Department of Indiana</i>, 323 U.S. 459 (1944)	4
<i>Great Northern Insurance Co. v. Read</i>, 322 U.S. 47, (1944)	5
<i>Marbury v. Madison</i>, 1 Cranch 137 (1803)	8
<i>Moyer v. Peabody</i>, 212 U.S. 78 (1909)	5
<i>Sterling v. Constantin</i>, 287 U.S. 378 (1932)	6

TABLE OF CONTENTS

Title 32, U.S.C., Sections 108, 110, 501, 701	9
Ohio Revised Code, Sections 5019.02, 5019.05, 5019.06, 5019.071, 5019.10	10
Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C., Sec. 1983	2

RULES

Rule 7, Federal Rules of Civil Procedure	7
Rule 8, Federal Rules of Civil Procedure	7
Rule 12, Federal Rules of Civil Procedure	7

U.S. CONSTITUTION

Article I, Section 8	9
Eleventh Amendment	3

OHIO CONSTITUTION

Article III, Section 10	10
-------------------------	----

TEXTS

Moore's Federal Practice	8
--------------------------	---

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-194

SARAH SCHEUER, Administratrix

of the Estate of Sandra Lee Scheuer, Deceased,

Petitioner,

JAMES RHODES, Governor

of the State of Ohio,

SYLVESTER DEL CORSO, Adjutant General

of the Ohio National Guard,

ROBERT CANTERBURY, Assistant Adjutant General

of the Ohio National Guard,

HARRY D. JONES, a Major

of the Ohio National Guard

JOHN E. MARTIN and RAYMOND J. SRP,

Captains of the Ohio National Guard,

VARIOUS OFFICERS AND ENLISTED MEN,

members of G Company, 107th Armored Cavalry

Regiment and A Company, First Battalion,

145th Infantry Regiment of the

Ohio National Guard, and

ROBERT WHITE, President,

Kent State University,

Respondents.

BRIEF OF DEFENDANT-RESPONDENT

JAMES A. RHODES IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIEF OF OTHER RESPONDENTS ADOPTED

Counsel for Respondent James A. Rhodes (in his individual capacity), which Respondent was Governor of Ohio at the commencement of this action, adopts and incorporates herein the Brief in Opposition to the Petition filed in this Court by Charles E. Brown, Counsel of Record for the Respondents; Robert F. Howarth, Jr. and William W. Johnston of Crabbe, Newlon, Potts, Schmidt, Brown and Jones, Counsel for the Respondents.

In supplement to the statements and arguments therein set forth in behalf of such of the named Respondents as were served with process, Respondent James A. Rhodes (hereinafter referred to as Respondent Rhodes) presents additional grounds why Petitioner's cause should not be reviewed by this Court.

QUESTIONS PRESENTED

1. Whether an action brought in a United States District Court under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.

2. Whether there is a doctrine of unqualified executive immunity which immunizes state officials from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, against the Governor of Ohio, Adjutant

General of the Ohio National Guard, officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the outright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

4. Whether Federal Courts have jurisdiction to review a Governor's determination, pursuant to his State's Constitution and laws, that it is necessary to order units of the National Guard into service to assist civil authorities in putting down civil disorders.

5. Whether officers and enlisted men of the Ohio National Guard, upon being ordered to duty by the Governor to suppress riots, can in any circumstance be deemed agents of the Governor rather than agents of the State of Ohio and the United States.

6. Whether injury caused by an act or omission of a member of the Ohio National Guard can be imputed to the Governor, rather than to an intervening cause, where it is not shown that such act or omission was embraced within orders issued by the Governor in calling units of the National Guard to active duty.

REASONS FOR DENYING THE WRIT

1. The Eleventh Amendment

Aware that nothing so catches the attention of this Court as a bald assertion that the Court below has ruled directly in conflict with controlling decisions of this Court, the Petitioner asserted that the Court of Appeals failed to follow the principle "firmly established in *Ex Parte Young*, 209 U.S. (1908) * * * that a State official

who engages in conduct in violation of the United States Constitution loses any shield of immunity otherwise possessed by the State."

Ex Parte Young lays down a far narrower principle, one that the Court of Appeals correctly found to be "inapposite". What *Ex Parte Young* stands for is that " * * * individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." *Ex Parte Young*, 209 U.S. at 155.

As Chief Judge Weick observed in the Court of Appeals' opinion herein, "*Ex Parte Young* * * * was an action for injunction * * *. Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the State's chief executive of his highest duty to suppress riots or insurrections and protect the public." (Appendix to Petition for Certiorari, page 12a.) Moreover, Governor Rhodes' calling out the National Guard on April 29, 1970, constituted a completed exercise of office, and thus a completed act of the State, not a threatened action "under color of law."

Reasons why *Ex Parte Young* is not controlling herein are further elaborated in the Brief in Opposition filed by Charles E. Brown, Robert F. Howarth, Jr. and William W. Johnston for the Respondents.

Petitioner's quotation (at page 11 of her Petition) from Justice Reed's Opinion for a unanimous Court denying certiorari in *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944) is irrelevant and misleading. There the action was held to be against the State and not maintainable because the State had not est-

sented to be sued in Federal Court. The same irrelevancy characterizes the reference to *Great Northern Insurance Co. v. Read*, 312 U.S. 47 (1941), referred to at page 12 of the Petition.

2. Executive Immunity

Counsel for Respondent Rhodes leaves to the Briefs in Opposition filed in behalf of all Respondents, argument as to the full thrust and scope of executive immunity. For the purposes of this Brief, it should suffice to point out that this Court has unhesitatingly given the protection of executive immunity to a Governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders directed toward that end. Even Judge Celebrezze, in his dissent below, conceded:

"The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive, and in and of itself is not subject to judicial review."

(Petition for Certiorari, page 69a.)

What Judge Celebrezze concedes can fairly be construed to be the import of *Moyer v. Peabody*, 212 U.S. 78 (1909), which, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former Governor (of Colorado) for a trespass against the Plaintiff. The complaint was dismissed on demurrer. Certiorari was denied, and the Court, speaking by Justice Holmes, said in part:

"As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a State law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication [the imprisonment ordered in this case]."

Moyer v. Peabody, 212 U.S. 78 at page 85.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this Court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved *Moyer v. Peabody*, *supra*, in these words (Chief Justice Hughes, at page 399):

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace, from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402.)

In the District Court, Petitioner herein sought to insulate her complaint from dismissal for want of jurisdiction by extravagant conclusionary allegations that Respondent Rhodes "recklessly wilfully, and wantonly," and outside the scope of his office,

"—ordered the Ohio National Guard to duty on the Kent State University's main campus;

"—ordered members of the Ohio National Guard to break up all assemblies without regard to their lawfulness; and

"—engaged in misconduct and caused Plaintiff's decedent to be shot and killed."

Such accusations were "reckless, wilful and wanton" on the part of the pleader. They were instantly negated by facts of which the District Court took judicial notice, triggered by the incorporation into the Motion to Dismiss of Respondent Rhodes' Proclamations as Governor

on April 29 and May 5, 1970, reciting the necessities that gave rise to the use of National Guard troops in aid of the civil authorities. (Petition for Certiorari, page 23a and 25a) Senior Circuit Judge O'Sullivan's impatience in his concurring opinion, with such extravagantly conclusory pleading has been interpreted by Petitioner's Counsel with curious distortion, as indicating "a purpose to cripple the Civil Rights Act". (Petition, page 13, note 12.)

3. Application of Rule 8, Federal Rules of Civil Procedure

Petitioner's question No. 3 asks simply whether the United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a Motion to Dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

The answer, of course, is in some instances "Yes"; but in the Complaint of Petitioner Scheuer against Respondent Rhodes in the United States District Court for the Northern District of Ohio, the answer is "No".

Rule 8 covers many things, but our prime concern is with Rule 8(d), which provides in its first sentence:

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

Rule 7(a) tells us that a Complaint requires a responsive pleading, but Rule 12(b) authorizes the defense that the Court lacks jurisdiction over the subject matter to be presented by motion.

After defining a "speaking motion" as one that to be sustained, requires reference to facts not appearing on

the issue of the pleading attacked, Moore's Federal Practice in its treatment of Rule 12(b) of Federal Rules of Civil Procedure (Volume 2A, page 2208), states flatly that a majority of decisions under Rule 12(b) approves the use of a speaking motion to state the defense of lack of jurisdiction over the subject matter of the action. Such defense was contained in the first branch of the separate Motion to Dismiss filed in the District Court by Respondent Rhodes, and it was also the basis of the Motion to Dismiss filed by all Respondents.

Both Motions to Dismiss "spoke" in two ways: (1) by incorporating the texts of the two Proclamations issued by Respondent Rhodes as Governor on April 29 and May 5, 1970, ordering into active service units and personnel of the National Guard, and (2) having thus placed the Proclamations before the Court, facilitated the Court's taking judicial notice of matters of public record and common knowledge with respect to events on the Kent State Campus April 29 through May 4, 1970.

4. Reviewability by Federal Courts of a Governor's Determination of Need to Call Out Units of the National Guard

A long line of Federal cases has for years yielded to the Executive the decision of political questions. Typical of the cases were *Cherokee Nation v. Georgia*, 9 Pet. 1; *Marbury v. Madison*, 1 Cranch 137; and *Cotnam v. Miller*, 307 U.S. 433. Then came Justice Brennan's Opinion in *Baker v. Carr*, 369 U.S. 186 (1962) that seemed to exclude for the future the argument that a case like the instant one against Respondent Rhodes should be treated as non-justiciable on the ground that a decision to call out the National Guard is "political". The Brief in Opposition filed herein by Charles E. Brown,

Robert F. Howard, Jr. and William W. Johnston, in behalf of all Respondents, logically establishes that Respondent Rhodes' decision as Governor to dispatch Ohio National Guard units to the Main Campus of Kent State University on April 29, 1970, as a "political decision" sanctioned by the Constitution of the United States and not affected by the *Baker v. Carr* ban.

Stated succinctly, Article I, Section 8, Clause 16 of the U.S. Constitution empowers Congress to "provide for organizing, arming and disciplining the Militia, reserving to the States, respectively, the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress." Congress has so provided in Title 32, United States Code, and has stated that:

"a state that does not comply with Title 32 shall lose its National Guard money" (Section 106);

"The President shall be the source of regulations and orders to organize, discipline, and govern the National Guard" (Section 110);

"the discipline, including training, of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force" (Section 501);

"the Army and Air National Guard shall use Army and Air Force type uniforms, respectively" (Section 701).

It is, therefore, clear that Respondent Rhodes' calling out the National Guard was in a context testifying the index of a political question as defined by Justice Brennan: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369

U.S. 186 at 217 (1962). In this instance, the "coordinate political department" is the Executive, i.e., the Presidency.

5. National Guardsmen as Agents of the State

By force of Article III, Section 10 of the Constitution of the State of Ohio, the Governor is "Commander-in-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States". Chapter 5919 of the Ohio Revised Code states the composition of and provides for the organization, discipline and training of the Ohio National Guard. That chapter is interwoven with requirements set forth in Title 32, United States Code, and in Regulations issued by the President. Section 5919.10, Ohio Revised Code, specifies the form of contract with the State of Ohio and the United States that each man enlisting in the Ohio National Guard must sign. The text of that section, continuously in force since September 9, 1957, reads as follows:

"5919.10. All men enlisting in the Ohio national guard shall sign an enlistment contract and subscribe to the following oath of enlistment: I do hereby acknowledge to have voluntarily enlisted this ____ day of _____, 19____, as a soldier in the national guard of the United States and of the state of Ohio, for a period of _____ year____, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the state of Ohio, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the president of the United States and of the governor of the state of Ohio, and of the officers appointed over me according

to law and the regulations and uniform code of military justice. This section shall not apply to personnel transferred or assigned to the Ohio National Guard under the laws and regulations of the United States.

From the foregoing, it is obvious as a legal matter that any enlisted man in the Ohio National Guard at times relevant to this action was by contract an agent of the State of Ohio and of the United States, and was not an agent of Respondent Rhodes individually.

Similarly, officers in the Ohio National Guard are agents of the State of Ohio and of the United States by force of Article I, Sec. 8, Clause 16, of the United States Constitution, heretofore quoted at page 9. Implementing the United States constitutional provision are Sections 5919.02, 5919.05, 5919.06 and 5919.071 of the Ohio Revised Code. Section 5919.05, containing the officer's Oath of Office, makes the Principal-Agent relationship clear.

8. Intervening Cause

The orders issued by Respondent Rhodes in his official capacity as Governor and Commander-in-Chief were those placing units of the Ohio National Guard on active duty as reflected in his Proclamations of April 29 and May 5, 1970. Those orders did not specify which units were to be called up, whether the officers and men in them were to carry guns loaded with live ammunition or not, or whether they were to break up assemblies. It thus cannot be argued that Governor Rhodes issued orders in excess of his powers as Governor and that such excess is imputable to Respondent Rhodes as an individual. There was no excess in the orders reflected in the Proclamation.

It is not conceded that any act of Respondent Rhodes was negligent, wilful, wanton, reckless or otherwise culpable. Any allegation to the contrary is a conclusion of the Petitioner. But even if it were conceded that he was negligent or even reckless in ordering the National Guard to the Main Campus of Kent State University, it could not rationally be further concluded that such order was the proximate cause of any damage to persons present on the Campus, when such damage was patently caused by an intelligent, independent, intervening act of another or others.

CONCLUSION

Petitioner's case presents no Federal question of substance for review by this Court. Therefore, the writ prayed for should be denied.

Respectfully submitted,

R. BROOKE ALLOWAY,

Counsel of Record for

Respondent James A. Rhodes.

AFFIDAVIT OF SERVICE

State of Ohio

County of Franklin

I, R. Brooke Alloway, Senior Partner in the firm of Tenner, Alloway, Goodman, DeLeone and Duffey, Counsel of Record for Respondent James A. Rhodes, herein, hereby certify that on this 24th day of January, 1973, I served three copies of the foregoing Brief of Defendant-Respondent James A. Rhodes in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on Michael E. Gelnar, American Civil Liberties Union of Ohio Foundation, Inc., 203

East Broad Street, Columbus, Ohio, 43215, Counsel for the Petitioner; Melvin L. Wulf, Sanford Jay Rosen, Joel M. Gora, American Civil Liberties Union of Ohio Foundation, Inc., 22 East 40th Street, New York, New York, 10016; Nelson G. Karl, 33 Public Square, Cleveland, Ohio, 44113, and Walter S. Haffner, 1008 Standard Building, Cleveland, Ohio, 44113, additional attorneys for Petitioner, no Counsel of Record having been designated; Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp, 42 East Gay Street, Columbus, Ohio, 43215; C. D. Lambrose, Esq., 750 Prospect Avenue, Cleveland, Ohio, 44115, Attorney for Raymond J. Srp; and Delmar Christensen, Esq., Attorney for Harry D. Jones and John E. Martin, Respondents herein, by depositing the same in a United States mailbox, first class postage prepaid, addressed to each of the attorneys above at his designated address, being the only parties hereto required to be served.

R. BROOKE ALLOWAY,
Counsel of Record for
Respondent James A. Rhodes.

Subscribed and sworn to before me this 24th day of January, 1973.

JOHN M. McELROY, Attorney At Law
 Notary Public—State of Ohio
 My commission has no expiration date.
 Section 147.03 R. C.

Supreme Court, U. S.
FILED

JAN 27 1973

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-914

SARAH SCHEUER, Administratrix of the
Estate of Sandra Lee Scheuer, Deceased,
Petitioner,

v.

JAMES RHODES, Governor of the State of Ohio, SYL-
VESTER DEL CORSO, Adjutant General of the Ohio
National Guard, ROBERT CANTERBURY, Assistant Ad-
jutant General of the Ohio National Guard, HARRY D.
JONES, a Major of the Ohio National Guard, JOHN E.
MARTIN, and RAYMOND J. SRP, Captains of the Ohio
National Guard, and ROBERT WHITE, President, Kent
State University,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

**BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY,
JONES, MARTIN, SRP, AND WHITE IN OPPOSITION**

CHARLES E. BROWN, Counsel of Record

ROBERT F. HOWARTH, JR., Of Counsel

WILLIAM W. JOHNSTON, Of Counsel

42 East Gay Street

Columbus, Ohio 43215

DELMAR CHRISTENSEN

Second National Bank Building

Akron, Ohio 44308

Attorney for Harry D. Jones

and John E. Martin

C. D. LAMBROSE

750 Prospect Avenue

Cleveland, Ohio 44115

Attorney for Raymond J. Srp

Attorneys for Respondents

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF CASE	7
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. The Lower Court Properly Considered the Complaint's Allegations	10
A. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R. Civ.P., motion to dismiss?	10
B. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P. required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.- Civ.P., motion to dismiss?	12
II. The Lower Court Properly Dismissed the Complaint for Its Failure to State a Claim Upon Which Relief Could be Granted	12
A. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts vis-à-vis a 42 U.S.C. Section 1983 cause of action?	13
B. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio and the named officers of the State of Ohio's organized militia possess qualified executive immunity vis-à-vis a 42 U.S.C. Section 1983 cause of action?	13

III. The Trial Court Lacked Subject Matter Jurisdiction	16
IV. The Allegations of Petitioner's Complaint Concerning the Propriety of Training, Weaponry and Orders of the Ohio National Guard Raise Non-justiciable Political Questions	23
V. The Federal Government is an Indispensable Party to the Adjudication of Petitioner's Allegations Concerning the Training, Weaponry and Orders of the Ohio National Guard	27
CONCLUSION	28
AFFIDAVIT OF SERVICE	29

TABLE OF AUTHORITIES

	Page
<i>Baker v. Carr</i> , 369 U.S. 186 (1962) _____	24, 27
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959) _____	20, 21
<i>Birnbaum v. Trussel</i> , 347 F.2d 86 (2nd Cir. 1965) _____	14, 15
<i>Carter v. Carlson</i> , 447 F.2d 358 (D.C. Cir. 1971) cert. granted sub nom., <i>District of Columbia v. Carter</i> , 404 U.S. 1014 (1972) _____	14, 15
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957) _____	11
<i>Cruz v. Beto</i> , 405 U.S. 319 (1972) _____	11
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963) _____	17, 18, 22, 23
<i>Ex parte New York</i> , 256 U.S. 490 (1921) _____	17, 23
<i>Ex parte Young</i> , 209 U.S. 123 (1908) _____	22
<i>Fitts v. McGhee</i> , 172 U.S. 516 (1899) _____	16
<i>Ford Motor Co. v. Treasury Department</i> , 323 U.S. 459 (1944) _____	17, 23
<i>Franklin v. Meredith</i> , 386 F.2d 958 (10th Cir. 1967) _____	15
<i>Gilbert v. David</i> , 235 U.S. 561 (1915) _____	11
<i>Great Northern Life Insurance Co. v. Read</i> , 322 U.S. 47 (1944) _____	16
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2nd Cir. 1949) _____	19, 20, 21
<i>Haines v. Kerner</i> , 404 U.S. 519 (1972) _____	11
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890) _____	16, 17
<i>Hoffman v. Halden</i> , 268 F.2d 280 (9th Cir. 1959) _____	15
<i>Jenkins v. McKeithan</i> , 395 U.S. 411 (1969) _____	11
<i>Jobson v. Henne</i> , 355 F.2d 129 (2nd Cir. 1966) _____	14, 15
<i>Jones v. Perrigan</i> , 459 F.2d 81 (6th Cir. 1972) _____	14, 15
<i>Joseph v. Rowlen</i> , 402 F.2d 367 (7th Cir. 1968) _____	14, 15
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1938) _____	22
<i>Lumbermen's Mutual Casualty Company v. Rhodes</i> , 403 F.2d 2 (10th Cir. 1968), cert. denied, 394 U.S. 965 (1969) _____	15

	Page
<i>McLaughlin v. Tilendis</i> , 398 F.2d 287 (7th Cir. 1968) _____	14, 15
<i>McNutt v. General Motors Accept. Corp.</i> , 298 U.S. 178 (1935) _____	11
<i>Martin v. Mott</i> , 25 U.S. (12 Wheat.) 19 (1827) _____	22
<i>Meredith v. Allen County War Memorial Hospital Commission</i> , 397 F.2d 33 (6th Cir. 1968) _____	14, 15
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) _____	22
<i>Morgan v. Rhodes</i> , 456 F.2d 608 (6th Cir. 1972) cert. granted sub nom. <i>Gilligan v. Morgan</i> , —U.S. —, 34 L.Ed.2d 217 (1972) _____	23
<i>North Pacific Steamship Co. v. Soley</i> , 257 U.S. 216 (1921) _____	11
<i>Parden v. Terminal R. of Alabama Docks Dept.</i> , 377 U.S. 184 (1964) _____	16
<i>Re Ayers</i> , 123 U.S. 443 (1887) _____	17, 18
<i>Roberts v. Williams</i> , 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972) _____	14, 15
<i>Silver v. Dickson</i> , 403 F.2d 642 (9th Cir. 1968) _____	15
<i>Sostre v. McGinnis</i> , 442 F.2d 178 (2nd Cir. 1971) _____	14, 15
<i>Wetmore v. Rymer</i> , 169 U.S. 115 (1898) _____	11
<i>Whirl v. Kern</i> , 407 F.2d 781 (5th Cir. 1968) _____	14, 15

CONSTITUTIONS AND STATUTES

United States Constitution:

Article I, Section 8, Clause 16 _____	24
Article VI _____	16, 22, 23
Amendment XI _____	passim

United States Code:

Title 28

Section 1331 _____	16
Section 1343 _____	16

	Page
Title 32	
Section 108	25
Section 110	25
Section 501	24, 26
Section 701	24, 26
Title 42	
Section 1983	<i>passim</i>
Ohio Constitution:	
Article III, Section 10	18
Article IX, Section 3	18
Article IX, Section 4	18
Ohio Revised Code:	
Section 3341.01	19
Section 3341.02 (B)	19
Section 3341.04	19
Section 5919.02	19
Section 5919.05	19
Section 5923.21	19
Section 5923.22	19
Section 5923.231	19
Section 5923.99 (A)	19

TEXTS AND ARTICLES

5 C. Wright and A. Miller, <i>Federal Practice and Procedure</i> , Civil Section 1350 (1967)	11
32 Am. Jur. 2d, <i>Federal Practice and Procedure</i> , Sections 170-172 (1967)	11
Comment, <i>Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity</i> , 44 CALIF L. REV. 887 (1956)	15

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-914

**SARAH SCHEUER, Administratrix of the
Estate of Sandra Lee Scheuer, Deceased,
Petitioner,**

v.

**JAMES RHODES, Governor of the State of Ohio, SYL-
VESTER DEL CORSO, Adjutant General of the Ohio
National Guard, ROBERT CANTERBURY, Assistant Ad-
jutant General of the Ohio National Guard, HARRY D.
JONES, a Major of the Ohio National Guard, JOHN E.
MARTIN, and RAYMOND J. SRP, Captains of the Ohio
National Guard, and ROBERT WHITE, President, Kent
State University,**

Respondents.

**BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY,
JONES, MARTIN, SRP, AND WHITE IN OPPOSITION**

QUESTIONS PRESENTED

1. Respondents are satisfied with petitioner's first ques-
tion presented for review (Pet. 3).¹
2. Respondents are not satisfied with petitioner's second
question (Pet. 3) in that the question is predicated upon a
legal conclusion never drawn by the court below. The
following two questions are more properly brought to this
Court for review:

¹For purposes of this brief in opposition, "Pet." together with Arabic numerals refers to pages of petitioner's petition for a writ of certiorari filed herein; "A." together with Arabic numerals refers to pages of petitioner's appendix appended to her petition for a writ of certiorari filed herein.

- A. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?
 - B. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?
3. Respondents are not satisfied with Petitioner's third question (Pet. 3) in that the question's simplistic approach clouds the issues presented. The following two questions are more properly brought to this Court for review:
- A. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R. Civ.P., motion to dismiss?
 - B. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R. Civ.P., motion to dismiss?

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

UNITED STATES CODE, TITLE 28**Section 1331:**

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

UNITED STATES CODE, TITLE 32**Section 108:**

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or

regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:

Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION**Article III, Section 10:**

He (Executive) shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.

Article IX, Section 3:

The governor shall appoint the adjutant general, quartermaster general, and such other staff officers, as may be provided for by law. Majors general, brigadiers general, colonels, or commandants of regiments, battalions, or squadrons, shall, severally, appoint their staff, and captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.

OHIO REVISED CODE**Section 3341.01:**

The Bowling Green state normal school, and the Kent state normal school, established under 101 O. L. 320 shall be known as the 'Bowling Green State University' and the 'Kent State University,' respectively.

Section 3341.02 (B):

The government of Kent state university is vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate.

Section 3341.04:

The boards of trustees of Bowling Green state university and Kent state university, respectively, shall elect, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary by said boards. The boards shall do all things necessary for the proper

maintenance and successful and continuous operation of such universities.

Section 5919.02:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, or arm of the service in which they are appointed.

Section 5919.05:

Commissioned officers of the Ohio national guard shall take and subscribe to the following oath of office: 'I, _____, do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the Governor of the state of Ohio; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of _____ in the National Guard of the United States and of the state of Ohio, upon which I am about to enter, so help me God.'

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding

officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99 (A) *infra*.]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends; may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Ohio Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF CASE

Excepting the adversary comment contained in the "Summary of the Complaint" (Pet. 5-8), respondents are satisfied with petitioner's resumé of the complaint's allegations. Further, respondents are satisfied with petitioner's portrayal of "Proceedings Below" (Pet. 8-10) subject to

the following correction. After quoting from the trial court's decision, petitioner states, "... no factual matter was offered by defendants to support any findings" (Pet. 9). This statement by petitioner is not correct since relevant Executive Proclamations, containing critical factual matter, were attached to respondents' motion to dismiss and presented to the trial court (A. 3a, 23a-26a).

Respondents wish, however, to emphasize and bring to this Court's attention certain realities present before the trial court.

1. There were but seven defendants within the personal jurisdiction of the trial court, and upon whom the judgment of the court of appeals is premised; to-wit, Governor Rhodes, Adjutant General Del Corso, Assistant Adjutant General Canterbury, Major Jones, Captains Martin and Srp, and President White (A. 20a).

2. Presented to the trial court as attachments to respondents' motion to dismiss were relevant Executive Proclamations evidencing that, at the time petitioner's alleged cause of action arose, the Ohio National Guard, including the respondents herein, had been called to active duty pursuant to the law of Ohio (A. 3a, 23a-26a).

3. Further, the relevant Executive Proclamations mentioned above factually demonstrated to the trial court that a condition of insurrection and rampage existed at the Kent State University, and that, in response thereto, the Ohio National Guard was ordered by Governor Rhodes to take that action necessary to protect life and property on and to restore order to the Kent State University (A. 3a; 23a-26a).

4. Petitioner's complaint acknowledges that, at the time petitioner's alleged cause of action arose, the respondents were all agents of the State of Ohio; that respondents were

ordered to active duty by the Governor of Ohio; and that none of the respondents herein fired the shot, killing petitioner's decedent (A. 83a-91a).

5. Respondents Rhodes, Del Corso, and Canterbury are specifically alleged to have ordered incapable Ohio National Guard troops to be present at the Kent State University and to carry guns loaded with live ammunition at the time they were ordered to this campus (A. 87a-88a).

SUMMARY OF ARGUMENT

For purposes of logically responding to petitioner's "Reasons for Allowance of the Writ" (Pet. 11), Respondents will depart from petitioner's organization.

The "ARGUMENT", hereinafter set forth, initially considers the substance of the third question presented for review, determining the appropriate allegiance due allegations of pleadings when ruling upon a Rule 12b(1), Fed. R.Civ.P., motion to dismiss (ARGUMENT, I.A., p. 10 *infra*). Thereafter, a Rule 12b(6), Fed.R.Civ.P., motion to dismiss will be similarly considered and distinguished (ARGUMENT, I.B., p. 12 *infra*).

Secondly, respondents' "ARGUMENT" will consider the propriety of the lower courts' ruling that petitioner's Section 1983 cause of action fails to state a claim upon which relief can be granted; to-wit, the applicability of the doctrine of executive immunity to the realities at bar (ARGUMENT, II, p. 12 *infra*). Thirdly, and notwithstanding this Court's opinion relative to the doctrine of executive immunity, it will be demonstrated that federal courts lack jurisdiction of the complaint's subject matter pursuant to the Eleventh Amendment, United States Constitution (ARGUMENT, III., p. 16 *infra*).

Further, and again separate and independent from the above, respondents' "ARGUMENT" will make evident that certain allegations of petitioner's complaint are properly dismissed since these allegations involve non-justiciable political questions (ARGUMENT, IV., p. 23 *infra*). Finally, these allegations will be shown properly dismissed since the Federal Government is an indispensable party thereto (ARGUMENT, V., p. 27 *infra*).

In sum, respondents' arguments, and necessarily the judgment of the lower courts, will be shown to be entirely consistent with the Federal Rules of Civil Procedure, and earlier decisions and reasoning of the federal courts.

ARGUMENT

I. The Lower Court Properly Considered The Complaint's Allegations.

Respondents' Argument will initially consider petitioner's third question for review (Pet. 3). The substance of this question is properly separated and viewed in relation to: (A.) Rule 12b(1), Fed.R.Civ.P., motions to dismiss, and (B.) Rule 12b(6), Fed.R.Civ.P., motions to dismiss. The propriety of this division is apparent from the lower appellate court's affirmance of the complaint's dismissal upon two independent bases; to-wit, the federal courts' lack of subject matter jurisdiction (Eleventh Amendment), and the complaint's failure to state a claim upon which relief can be granted (Executive immunity) (A. 20a).

A. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ.P., motion to dismiss?

It is well-established that courts of limited jurisdiction, including the federal courts of this country, may weigh the merits of a motion putting to issue the court's subject matter jurisdiction. Rule 12h(3), Fed.R.Civ.P., endorses this basic precept:

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

This Court, interpreting the predecessor to Rule 12h(3), stated the rule in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 184 (1935):

The trial court is not bound by the pleadings of the parties, but may, on its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.'

See also: *Wetmore v. Rymer*, 169 U.S. 115 (1898); *Gilbert v. David*, 235 U.S. 561 (1915); *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921); 5 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil Section 1350 (1969); 32 Am. Jur. 2d, *Federal Practice and Procedure*, Sections 170-172 (1967).

Hence, notwithstanding the pleading guidelines of Rule 8, Fed.R.Civ.P., the court may inquire into the facts when determining its jurisdiction over the subject matter of an action.

It is particularly relevant to note that all the cases cited by petitioner under the discussion of his third question (Pet. 16) deal with this Court's consideration of Rule 12b(6) motions to dismiss. [*Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Conley v. Gibson*, 355 U.S. 41 (1957)] Petitioner thereafter concludes:

On the basis of such unprincipled conduct, it would be a rejection of reality to engage in the presumption that the decision of Judge Connell and the vote of Judge O'Sullivan were not caused, at least in part, by their views of the facts (Pet. 16).

Respondents submit that the lower courts' "views of the facts," when ruling upon respondents' motion attacking the court's jurisdiction of the subject matter, were entirely consistent with the Federal Rules of Civil Procedure and previous rulings by this Court. The determination of the lower court dismissing petitioner's action for lack of subject matter jurisdiction in accordance with the above, will be considered hereinafter (ARGUMENT, III., p. 16 *infra*).

B. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ.P., motion to dismiss?

Respondents would, themselves, answer the above-posed question in the affirmative and have no quarrel with petitioner's discussion of his third question (Pet. 16), limiting the discussion's bounds to Rule 12b(6) motions to dismiss. The propriety of the lower court's judgment dismissing petitioner's action for its failure to state a claim upon which relief can be granted will next be considered.

II. The Lower Court Properly Dismissed The Complaint For Its Failure To State A Claim Upon Which Relief Could Be Granted.

Petitioner's second question (Pet. 3) is predicated upon a legal conclusion never drawn by the court below. The majority opinion held that the Governor of the State of Ohio, under the facts of this case, had absolute immunity to petitioner's Section 1983 action (A. 12a), and that the remaining respondents possessed a qualified immunity

(A. 20a). Therefore, it is necessary to restate petitioner's second question presented for review.

A. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts vis-à-vis a 42 U.S.C. Section 1983 cause of action?

This specific issue will be considered in a separate brief in opposition filed on behalf of Respondent, Governor James Rhodes.

B. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio and the named officers of the State of Ohio's organized militia possess qualified executive immunity vis-à-vis a 42 U.S.C. Section 1983 cause of action?

Respondents agree that the lower court was required to accept the allegations of petitioner's complaint as true when considering the sufficiency of the complaint under a Rule 12b(6), Fed.R.Civ.P., motion to dismiss. Hence, for present purposes, it is necessary to re-emphasize certain uncontradicted facts before the lower court.

First, at the time petitioner's alleged cause of action arose, the respondents were all agents of the State of Ohio (A. 83a-91a), and, further, were ordered to active duty by the Governor of Ohio to protect life and property on and to restore order to the Kent State University (A. 3a; 23a-26a). Also, as the complaint acknowledges, none of the respondents herein fired the shot, killing petitioner's decedent (A. 88a).

Petitioner contends that the lower court's executive immunity determination is in conflict with a consistent line of decisions adopting the position that there is no executive

immunity to a Section 1983 cause of action (Pet. 14). Respondents submit that petitioner's recitation of law is totally inaccurate.

In support of petitioner's proposition that there is no executive immunity if the action is brought under Section 1983, the following cases are cited (Pet. 14): *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1966) (1983 action by an inmate of a state mental institution against officers and supervising psychiatrist of the institution); *Birnbaum v. Trussel*, 347 F.2d 86 (2nd Cir. 1965) (1983 action by doctor against commissioners of city department of hospitals and union president for dismissal on grounds of racial prejudice); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968) (1983 action by doctor against hospital commission and individual commission members); *McLaughlin v. Tilendis* 398 F.2d 287 (7th Cir. 1968) (1983 action by former probationary teachers against superintendent and elected members of board of education); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968) (1983 action against police officer for false arrest); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) (1983 action against sheriff for holding prisoner in jail after charges had been dismissed); *Sostre v. McGinnis*, 442 F.2d 178, 205 n. 51 (2d Cir. 1971) (1983 action by prisoner against state commissioner of correction and two prison wardens); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) cert. granted sub nom., *District of Columbia v. Carter*, 404 U.S. 1014 (1972) (1983 action against precinct captain and police chief and the District of Columbia); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972) (1983 action by minor prisoner against trusty, youth court judge, municipal court judge, superintendent of county farm, member of board of supervisors of county, county sheriff, and sheriff's officials); *Jones v. Perrigan*,

459 F.2d 81 (6th Cir. 1972) (1983 action against FBI agent for false imprisonment and malicious prosecution).

Looking to the cases cited by petitioner for the proposition that there is a consistent line of decisions adopting the position that there is no executive immunity available against an action brought under Section 1983 (Pet. 14), respondents submit that petitioner's contention is not even remotely supported by the cases cited above. Neither *Meredith*, nor *Whirl*, nor *Joseph*, nor *Sostre* (except in the footnote, hardly characterized as the holding of a court) discuss any issue concerning executive immunity and consequently have no relevance to the case at bar. *Jobson*, *McLaughlin*, *Carter*, *Roberts* and *Jones* all recognize the existence of executive immunity as a defense to a Section 1983 action but would apply it sparingly. It must be noted that these cases all recognize the viability of the doctrine of executive immunity under a Section 1983 cause of action. The holding of these cases is entirely consistent with the holding of the lower court herein. The *Birnbaum* case is distinguishable from the case at bar since it was brought on the grounds of racial discrimination which would necessarily involve different policy considerations. See, Comment, *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 Calif. L. Rev. 887 (1956).

Contrarily, a consistent line of cases hold state governmental officials immune to Section 1983 actions for discretionary acts done within the scope of their authority. See, e.g., *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Lumbermens Mutual Casualty Company v. Rhodes*, 403 F.2d 2 (10th Cir. 1968), cert. denied, 394 U.S. 965 (1969); *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968).

Examining the realities before the lower courts (*See, STATEMENT OF CASE, p. 7 supra*) it is clear that respondents were all acting within their sphere of executive authority and, more importantly, none of the respondents fired the fatal shot. The court's determination that the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio and the named officers of the Ohio National Guard were shielded from suit under the doctrine of executive immunity, is in total harmony with the great weight of authority.

III. *The Trial Court Lacked Subject Matter Jurisdiction.*

The trial court's lack of subject matter jurisdiction is separate from and independent of the failure of petitioner's complaint to state a claim upon which relief can be granted. However, if this Court should determine the doctrine of executive immunity inapplicable to any one of the respondents, the trial court's lack of subject matter jurisdiction becomes even more convincing. This functional reality will be demonstrated herein.

Notwithstanding a literal reading of the Eleventh Amendment, United States Constitution, there is no question but that this Amendment prohibits federal courts from exercising jurisdiction over actions brought against a state at the instance of a citizen of the same state. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 51 (1944); *Fitts v. McGhee*, 172 U.S. 516, 524 (1899); *Hans v. Louisiana*, 134 U.S. 1, 10, 15 (1890). The Eleventh Amendment, being part of the Supreme Law of the Land, cannot be diminished by congressional enactment. Congress did not and could not expose the states to federal jurisdiction by creating Section 1983 causes of action and providing the corollary jurisdictional provisions (28 U.S.C. Sections 1331, 1343). *Parden v. Terminal R. of Alabama Docks*

Dept., 377 U.S. 184, 186 (1964); *Ex parte New York*, 256 U.S. 490, 497-498 (1921); *Hans v. Louisiana*, *supra*, 134 U.S. at 10.

Further, it is established that the Eleventh Amendment cannot be avoided by naming nominal party defendants when the essential nature and effect of the lawsuit affects a sovereign state. *Ford Motor Co. v. Treasury Department*, 322 U.S. 459, 464 (1944); *Ex parte New York*, *supra*, 256 U.S. at 500; *Re Ayers*, 123 U.S. 443, 492 (1887). The relevant criteria for determining when a lawsuit's essential nature and effect results in the action being against a sovereign are well-summarized by this Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963):

The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738, 91 L.Ed. 1209, 1215, 67 S.Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Commerce Corp.*, *supra* (337 U.S. at 704); *Re New York*, 256 U.S. 490, 502, 65 L.Ed. 1057, 1062, 41 S.Ct. 588 (1921). (Emphasis added)

It is important to note that these "tests" are stated in the disjunctive, and therefore, if any one of the standards is met in a given case, the suit must be held to be against the sovereign. These determinations are relevant and crucial to the achievement of the object and purpose underlying the Eleventh Amendment, as defined by this Court in *Re Ayers*, *supra*, 123 U.S. at 505-506:

The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several

States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as affectually to accomplish the substance of its purpose.

In accordance with the established law set forth above, the Eleventh Amendment prohibited the trial court from acquiring jurisdiction over petitioner's stated causes of action.

Before the trial court, when ruling upon respondents' Rule 12b(1) motion to dismiss, was the factual matter alleged in petitioner's complaint and contained in the Executive Proclamations attached to the motion (*See, STATEMENT OF CASE*, pp. 7 *supra*). Also, present in the trial court was the law of Ohio defining the legal obligations of respondents to the sovereign.² The trial court, weighing these realities (*ARGUMENT*, I.A. p. 10 *supra*) concluded, under the applicable standards announced by this Court in *Dugan v. Rank*, *supra*, that it was without subject matter jurisdiction. This judgment was entirely

²The Ohio Constitution places upon the Governor of Ohio the responsibility of Commander-in-Chief of the Ohio National Guard (Ohio Const. art. III, sec. 10) and the obligation of appointing the Adjutant General and Assistant Adjutant General of the state's Militia (Ohio Const. art. IX, sec. 3). Further, the duty of appointing line and staff officers and ordering them to service when necessary "to execute the laws of the state, to suppress insurrection, and repel invasion," is posited with the Governor (Ohio Const. art. IX, sec. 4). (footnote continued).

consistent with the prior decisions and reasoning of this Court, and demanded by the Eleventh Amendment.

Ohio would be restrained from acting, and the public administration of the law greatly curtailed if the federal courts were to assume jurisdiction over petitioner's causes of action. Although not factually identical, the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), attests to these dire effects:

... it is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the un-

The statutory law of Ohio states that all commissioned officers of the Ohio National Guard shall be appointed by the Governor, and obligates all commissioned officers to swear their allegiance to the state, and to obey the orders of the Governor (Ohio Rev. Code Sections 5919.02, 5919.05). The Governor has the sovereign's sanction to order the Ohio National Guard, "to aid civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion . . ." (Ohio Rev. Code Sections 5923.21, 5923.231). No officer may refuse to appear when ordered by the Governor to suppress or prevent riot or insurrection (Ohio Rev. Code Section 5923.22) in accordance with the above. If an officer of the Ohio National Guard fails to obey the Governor's order, he may be fined \$1,000, or imprisoned six months, or both [Ohio Rev. Code Section 5923.99(A.)].

Relative to the status and obligations of Respondent White, President of Kent State University, the statutory enactments of the sovereign designate the Kent State University a state institution (Ohio Rev. Code Section 3341.01) and vest its government in a board of trustees, appointed by the governor with the advice and consent of the senate [Ohio Rev. Code Section 3341.02(B)]. Further, this board of trustees is responsible to the sovereign for the election of a president and for the successful operation of the university. The President of Kent State University is, consequently, responsible to the State of Ohio through the board of trustees to do all things necessary for the proper maintenance and successful and continuous operation of such university (Ohio Rev. Code Section 3341.04).

flinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. (177 F.2d at 581)

In the case of *Barr v. Matteo*, 360 U.S. 564 (1959), this Court recognized the inevitable restraint on the sovereign generated by lawsuits against the sovereign's agents:

We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. (360 U.S. at 564-565)

* * *

The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: (Quoting *Gregoire v. Biddle, supra*) (360 U.S. at 571)

* * *

It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public ser-

vice. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings. (360 U.S. at 576)

Under the reasoning of *Gregoire* and *Barr*, the State of Ohio would be restrained from acting in time of rampage and insurrection, and the public administration of this sovereign's laws would be greatly impeded if the federal courts were to assume subject matter jurisdiction over petitioner's causes of action. On balance, before the trial court, was the State of Ohio's ability to protect life and property within her bounds.

If in times of insurrection and emergency demanding discretionary acts, Ohio's public officials, functioning under their unchallenged obligation to the sovereign, could, at the stroke of a vindictive plaintiff's pen, be subjected to the irrationality of hindsight and *ex post facto* speculation, this sovereign would be hard pressed to find responsible officials to act. This reality, manifest in the trial court and court of appeals, prohibited the federal court from acquiring subject matter jurisdiction over petitioner's action. If this Court were to determine that the doctrine of executive immunity is not available to shield executive officials from the inevitable lawsuits, the adverse effects upon the sovereign become even more demonstrable.

Rather than departing from the established law, the lower courts' judgment was mandatory: under the facts

at bar; in accordance with the Eleventh Amendment; the object and purpose behind this Amendment; and the tests announced by this Court in *Dugan v. Rank*, *supra*. The trial court, balancing the facts at bar, was bound by the Supreme Law of the Land.

Ex parte Young, 209 U.S. 123 (1908) and its progeny, cited by petitioner, are not in point. *Young* involved an injunction action brought against a state's attorney general seeking to prohibit the *in futuro* enforcement of an unconstitutional state statute. Under the fiction that a state never acts unconstitutionally, this Court held that the injunction was against the attorney general acting on his own frolic. Petitioner's action is readily distinguishable. Petitioner's lawsuit demands an *ex post facto* evidentiary hearing which, as shown above, is the very evil that would seriously affect Ohio's ability to protect life and property within the state. Further, the fiction of *Young* is irrelevant since the law of Ohio, obligating respondents to act at Kent State University, is not being constitutionally challenged.

Judge Celebrezze, dissenting in the court of appeals, concludes that, because petitioner is neither seeking money damages from the state treasury nor interfering with Ohio's contract rights, her suit cannot affect this sovereign. (A. 41a). Such a narrow approach not only ignores the expressed standards in *Dugan v. Rank*, *supra*, but is lacking in logic.

This Court, on numerous occasions, has identified the most important function of government to be providing security for the citizenry and the protection of their property. *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (dissenting opinion, White, J.); *Lanzetta v. New Jersey*, 306 U.S. 451, 455 (1938); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1927). Further, as recognized by the dissenting judge,

this Court has expressly held that if a suit seeks damages from a state's treasury (*Ford Motor Co. v. Department of Treasury, supra*) or seeks to compel a state to specifically perform its contract obligations (*Ex parte New York, supra*), the suit must be declared violative of the Eleventh Amendment, notwithstanding the fact that the state was not a named party to the lawsuit. Even ignoring the expressed tests of *Dugan v. Rank, supra*, it most surely follows that if the state's fiscal integrity and immunity to contract obligations are protected, the highest function of state government will be even more zealously insured.

Each case, presenting facts similar to those now being reviewed, must be analyzed separately; i.e., the tests of *Dugan v. Rank, supra*, must be applied to the circumstances predicated each complaint, with the balance adjudged by the trial court. In those cases where the trial court determines, as here, that a claimant's Section 1983 action diminishes the object and purpose of the Eleventh Amendment, the complaint must yield to the Supreme Law, and the court must conclude that it is without subject matter jurisdiction.

IV. *The Allegations Of Petitioner's Complaint Concerning The Propriety Of Training, Weaponry, And Orders Of The Ohio National Guard Raise Non-Justiciable Political Questions.*

Petitioner's complaint alleges that Respondents Rhodes, Del Corso, and Canterbury intentionally and recklessly ordered incapable Ohio National Guard troops to the Kent State University, further permitting these troops to carry guns loaded with live ammunition. (A. 87a-88a.) The identical issue presented herein by these allegations is now before this Court in the case of *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), cert. granted sub nom., *Gilligan v. Morgan*, 34 L.Ed.2d 217 (1972).

The indicia for determining the presence of a political question are defined by this Court in *Baker v. Carr*, 369 U.S. 186 (1962):

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (369 U.S. at 217)

As is indicated in *Baker*, (369 U.S. at 217), the presence of any one of these factors justifies dismissal under the political question doctrine. In the instant case, all of the defined elements are present.

First, there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Article I, Section 8, Clause 16, of the Constitution, places with Congress the authority to prescribe weaponry and discipline for the Militia. Congress, acting within this constitutional delegation of power, has enacted law providing for the training of the Army National Guard, 32 U.S.C. Section 501 (See also, 32 U.S.C. Sections 502-507). Likewise, Congress has prescribed the arms and equipment issued to the Army National Guard. 32 U.S.C. Section 701.

In addition, Congress has authorized the President to prescribe regulations governing the Army National Guard and has given the President the means to enforce the regulations which he and Congress prescribe. 32 U.S.C. Sections 110, 108, respectively.

Secondly, the judiciary is ill-suited to resolve issues involving the ever-changing training, weaponry and orders for the National Guard. The judiciary, in making its determination, is limited to the evidence presented and the arguments made by the parties; however, many other considerations are necessary to determine the appropriate training and equipment for the Militia. Such training and equipment must be sufficient to protect the safety of the troops themselves; to protect the safety and property of those in the area of the disturbance; to enable the troops to control the disturbance and restore order as soon as possible; *etcetera*. Both the legislative and executive branches can deal with these complex issues in a wider context and provide a more rational and sophisticated solution than the judiciary.

Further, the judiciary does not have adequate means to discover the information necessary to resolve these military issues. There are continuous advancements in the equipment and weapons which could be made available to National Guard troops. Constant developments and changes are made in military theory relating to the proper method of training troops. Neither the courts nor the individual parties to a litigation have ready access to this necessary information. Both the executive and legislative branches of the government have means of gathering the relevant data vastly superior to that of the judiciary.

Even if the courts could have access to such information, the legislature or the executive are in a better position to

render the best possible solution to the problem. The court has no means to determine how new equipment or new theories of military training will function in an actual emergency. In contrast, the Executive, through the Department of the Army, has the means available for testing new equipment and new methods of training under simulated emergency situations.

Finally, the judgment which the judiciary might reach in the instant case would express a lack of respect for the executive and legislative branches of government. As shown above, Congress is vested by the Constitution with the authority and responsibility to train and provide weapons and equipment for members of the National Guard. The President also has the authority to prescribe regulations concerning these matters. Any judicial determination as to the proper training, equipment or orders of the National Guard would necessarily indicate a lack of confidence in the ability of the legislative and executive branches to carry out their prescribed responsibilities.

A decision by the judiciary would also create the potentiality of multifarious, and even conflicting, pronouncements by the various branches on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. See, e.g., 32 U.S.C. Section 501, *et seq.*, and 32 U.S.C. Section 701. Congress may enact new statutes or amend existing statutes in the future. The President has prescribed regulations concerning the training of the National Guard. He also may prescribe new regulations on the subject in the future. If the Court attempts to prescribe the training, weapons or orders of the National Guard, there is a real possibility that such a mandate would conflict with either existing or future directives from Congress or the President.

The most imminent danger caused by a conflict between a judicial order and the directives of Congress or the President is not the "embarrassment" mentioned in the *Baker, supra*, 369 U.S. at 217. Rather, it is the confusion and resulting delay which such conflicting directives would cause. It would be necessary to seek a judicial resolution of the conflict before the National Guard could act. In dealing with civil disorders, the state must be able to act immediately. If there is a delay, the harm to be prevented could be accomplished without resistance.

For the reasons stated above, it is patent that petitioner's allegations concerning training, weaponry, and orders of the Ohio National Guard involve non-justiciable political questions.

V. The Federal Government Is An Indispensable Party To The Adjudication Of Petitioner's Allegations Concerning The Training, Weaponry, And Orders Of The Ohio National Guard.

It stands without citation that the Federal Government cannot be made a party to petitioner's lawsuit. Further, as has been demonstrated above (ARGUMENT, IV. p. 23 *supra*), the Federal Government is intrinsically involved under the allegations of petitioner's complaint concerning the training, weaponry, and orders of the Ohio National Guard.

Pursuant to Rule 19(a), Fed.R.Civ.P., it is clear that the Federal Government should, in view of petitioner's allegations, be made a party to the instant action. Since the Federal Government is indispensable and cannot be joined as a party herein, the court, under Rule 19(b), Fed.R. Civ.P., was correct in dismissing petitioner's causes of action.

CONCLUSION

Respondents respectfully submit that the petition for writ of certiorari herein should be denied since the determination of the lower courts is consistent with the law of this country. In the first instance, the Eleventh Amendment, United States Constitution, prohibits the federal courts from assuming subject matter jurisdiction. Secondly, and independent of the above, the lower court correctly held that petitioner's complaint failed to state a claim upon which relief could be granted.

Further, and again independent of the above, those allegations of petitioner's complaint putting to issue the training, weaponry, and orders of the Ohio National Guard involve non-justiciable determinations of a political nature. Finally, those allegations specifically mentioned above, demand dismissal since the Federal Government is an indispensable party to their resolution.

Respectfully submitted,

CHARLES E. BROWN, Counsel of Record
ROBERT F. HOWARTH, JR., Of Counsel
WILLIAM W. JOHNSTON, Of Counsel

DELMAR CHRISTENSEN, Attorney
for Harry D. Jones and John E. Martin

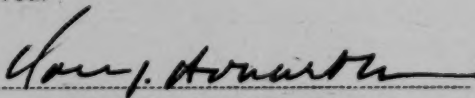
C. D. LAMBROSE, Attorney for
Raymond J. Srp

Attorneys for Respondents

AFFIDAVIT OF SERVICE

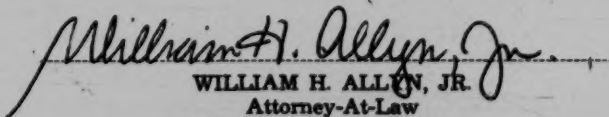
STATE OF OHIO }
 COUNTY OF FRANKLIN } SS

I, ROBERT F. HOWARTH, JR., an attorney in the office of Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp, herein, depose and say that on this 21st day of January, 1973, I served three copies of the foregoing brief in opposition on Michael E. Geltner, Leonard J. Schwartz, American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio 43215; Melvin L. Wulf, Sanford Jay Rosen, Joel M. Gora, American Civil Liberties Union of Ohio Foundation, Inc., 22 East 40th Street, New York, New York 10016; Nelson G. Karl, 33 Public Square, Cleveland, Ohio 44113; Walter S. Haffner, 1008 Standard Building, Cleveland, Ohio 44113; attorneys for petitioner, no Counsel of Record having been designated, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to each of the attorneys above at their designated address, being the only parties hereto required to be served.



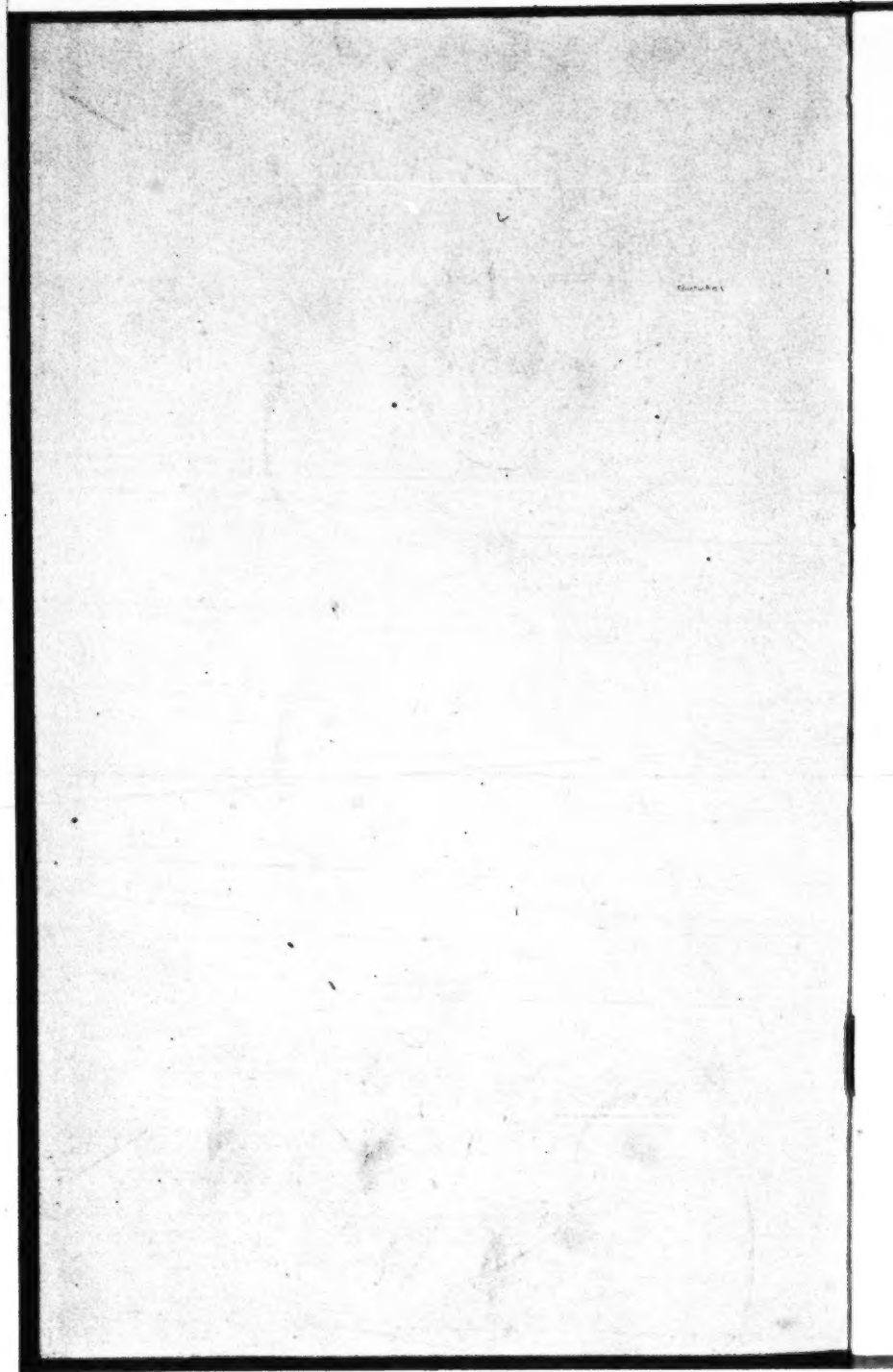
ROBERT F. HOWARTH, JR.

Subscribed and sworn to before me this 21st day of January, 1973.

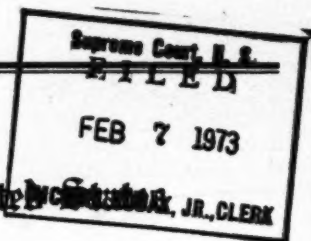


WILLIAM H. ALLEN, JR.
 Attorney-At-Law

Notary Public-State of Ohio
 My Commission Has No Expiration Date
 Section 147.03, O.R.C.



SUPREME COURT, U. S.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-914

SARAH SCHEUER, Administrator of the Estate of
Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY
D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, Various Officers and
Enlisted Men and ROBERT WHITE,

Respondents.

PETITIONER'S REPLY BRIEF

MICHAEL E. GELTNER
LEONARD J. SCHWARTZ
American Civil Liberties
Union of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

Of Counsel:

STANLEY K. LAUGHLIN, JR.
NIKI Z. SCHWARTZ
MICHAEL S. HARSHMAN
American Civil Liberties
Union of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

WALTER S. HAFFNER
1008 Standard Bldg.
Cleveland, Ohio 44113

MELVIN L. WULF
SANFORD JAY ROSEN
JOEL M. GORA
American Civil Liberties
Union of Ohio Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL
33 Public Square, Suite 210
Cleveland, Ohio 44113

Attorneys for Petitioner

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-914

SARAH SCHEUER, Administrator of the Estate of
Sandra Lee Scheuer, Deceased,
Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY,
HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SEP,
Various Officers and Enlisted Men and ROBERT WHITE,
Respondents.

PETITIONER'S REPLY BRIEF

Introductory Statement

Petitioner does not wish to burden the Court with further arguments on whether the writ should issue. It is believed, however, that a short reply may clarify a few points raised by Respondents' opposition briefs and thus aid the Court's deliberations.

POINTS IN REPLY

A. Reply to Brief of Respondents Del Corso, Canterbury, Jones, Martin, Srp and White.

1. At pages 1 and 2 of their brief, Respondents have rephrased the second question presented. The rephrasing presents the view that the Court of Appeals made a distinction between Respondent Rhodes, who was governor of Ohio when he engaged in the conduct leading to this suit, and the other defendants, granting an absolute immunity to the former but only a qualified immunity to the latter. Nothing in the record seems to support that position. Judge Weick's opinion for the majority treated all defendants as covered by the same immunity. He concluded:

The governor, the officers of the National Guard, and the President of Kent State University all have executive immunity. (20a)¹

Judge O'Sullivan concurred in Judge Weick's opinion and did not devote any space in his own opinion to discussing the immunity issue. If the Court of Appeals had thought the immunity it granted was qualified, it should have at least determined whether application of the immunity at the pleading stage was consistent with the allegations of the complaint.²

¹ References to the pages of the Appendix, attached to the Petition for a Writ of Certiorari, will be made as (—a).

² The allegations of culpability in the complaint would seem to satisfy any conditions, if the immunity were conditioned. The usual method for disposing of conditioned immunity issues before trial is by summary judgment motion, in which the defendant sets forth

2. At page 8 of their brief, Respondents contend that the Governor's Executive Proclamation is conclusive of both the facts it recites, and of the legality of the Respondents' conduct, and that such proclamation somehow forms an evidentiary base supporting the factual conclusions reached in the opinions below. In part, this contention presses the legal conclusion, rejected in *Sterling v. Constantin*, 287 U.S. 378 (1932), that gubernatorial conduct and declaration is conclusive and unreviewable. Whether the Court ought to consider this issue will be discussed *infra* at page 4. As a procedural point, there was no factual matter appended to the motions to dismiss of the sort which would turn them into defendants' motions for summary judgment. The only attachments were the executive proclamations activating the Ohio National Guard (23a) and recording their assignment to Portage County (Kent State University) and Franklin County (Ohio State University) (25a). They evidence nothing more than the fact that the National Guard was activated and ordered to the places mentioned and do not even recite the underlying circumstances.

3. At pages 10-12 of their brief, respondents argue that the district judge and Judge O'Sullivan were authorized to go beyond the pleadings and find facts because the motion to dismiss was jurisdictional in nature, falling under Rule 12 (b)(1) of the Federal Rules of Civil Procedure, rather than Rule 12(b)(6). Petitioner's complaint about the judges' conduct is more basic. They found exculpatory facts with-

the facts supporting the conclusion that the culpability allegations are not factually supportable. See, e.g., *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966). Otherwise, the issues are factual and therefore triable.

out a record before them and in the face of contrary allegations in the complaint. To the extent such factual conclusions had a bearing on the decisions below, petitioner was denied a chance to prove her case.

4. At pages 23-27 of their brief, respondents contend that the subject matter of this action is non-justiciable because it involves the conduct and operations of the National Guard. This issue was not directly considered below in this case, although, as the Court knows, it is the principal contention of the petitioner in *Gilligan v. Morgan*, No. 71-1553, cert. granted, October 24, 1972, a case involving many of the same facts and issues as this one. Petitioner believes, however, that the result in *Gilligan v. Morgan* may bear strongly on the outcome of this case and has so stated to the Court.³ Indeed, if the unusual result reached below were not enough justification for granting the writ, the commonality of issues in this case and *Gilligan v. Morgan* would support their resolution on a record raising all of their ramifications and thus justify issuance of the writ in this case.

5. At pages 13-16 of their brief, respondents argue the contrary of petitioner's claim that the holding below adopting executive immunity for all defendants is against the weight of authority. This reply brief is not the proper place to resolve a dispute over whose cases hold what. At the very least, respondents' position supports the issuance of the writ to resolve the question.

³ In December, 1972, the petitioners in *Gilligan* filed a suggestion of mootness and, in response, counsel for respondent in *Gilligan* (who is also counsel for petitioner in this case) suggested that one of the factors militating against mootness in *Gilligan* was the pending petition in this case. At that time, the petitioner in *Gilligan* and the respondents in this case took the position that there were no common issues and objected to any consolidation.

6. At page 27 of their brief, respondents contend that claims relating to Ohio National Guard training and weapons involve the United States, which was not sued, as an indispensable party. A similar statement was made in Judge Weick's opinion (19a), although he does not appear to have relied on the point as a ground of decision. Petitioner has no objection to the point being considered, although it would seem to have little weight. In the context of a damage action, such as this one, the most that can be said for the claim, based upon respondent's contention, not the complaint, is that the United States is a joint tortfeasor. It is not normally the rule that all joint tortfeasors need be sued under threat of dismissal for failure to join indispensable parties. See generally, I F. Harper and F. James, *The Law of Torts* §10.2 and esp. p. 720 (1956). The United States is, of course, immune from suit except under the Federal Tort Claims Act.

B. Reply to Brief of Respondent Rhodes.

1. Respondent Rhodes argues rather stridently at pages 6-7 that the pleadings are improper and at pages 10-11 that as governor of Ohio he was not responsible for the conduct of Ohio National Guard troops under any theories of agency law. Both positions reflect a rather fundamental misconception of the complaint. There is no claim for vicarious liability in the complaint, nor are the allegations respecting Respondent Rhodes limited to the claim that he activated the Ohio National Guard and ordered contingents to duty in and about Kent State University. The specific acts of misconduct of Respondent Rhodes by which, it is alleged, he effected a deprivation of life without due process of law are that he

... ordered members of the Ohio National Guard on and about Kent State University's main campus when such action was unnecessary ... engaged in rhetoric and gave Ohio National Guard officers orders which substantially increased the risk of unnecessary violence[,] ... permitted ... troops ... to carry guns loaded with live ammunition, under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting innocent persons ... [and] ordered members of the Ohio National Guard to break up all assemblies without regard to whether said assemblies were lawful or unlawful ... (87a)

2. Respondent Rhodes argues, at pages 11-12 of his brief, that even if his conduct were wrongful, it did not proximately cause the death of petitioner's decedent. While this contention was raised below, it was not relied upon as a ground of decision. It appears unlikely that the Court's consideration of this issue at this time would enhance the progress of the case and the issue is not in itself serious enough to justify Supreme Court consideration. Cf. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 524-558 (1957) (dissenting opinion of Justice Frankfurter).

The prevailing view, of course, is that the extent to which a subsequent event breaks the legal chain of causation is ordinarily one for the jury to decide under appropriate instructions. See, e.g., *Petitions of Kinsman Transit Co.*, 338 F.2d 708 (2nd Cir. 1964); *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955); *Pease v. Sinclair Refining Co.*, 104 F.2d 183 (2nd Cir. 1939); *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921).

CONCLUSION

The briefs in opposition to the petition in this case demonstrate, at the very least, that the writ should issue.

Respectfully submitted,

MICHAEL E. GELTNER

LEONARD J. SCHWARTZ

American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF

SANFORD JAY ROSEN

JOEL M. GORA

American Civil Liberties Union
of Ohio Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL

33 Public Square, Suite 210
Cleveland, Ohio 44113

Attorneys for Petitioner

Of Counsel:

STANLEY K. LAUGHLIN, JR.

NIKI Z. SCHWARTZ

MICHAEL S. HARSHMAN

American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

WALTER S. HAFFNER

1008 Standard Bldg.
Cleveland, Ohio 44113

TABLE OF CONTENTS

Table of Authorities	i, ii
Brief of Other Respondents Adopted	1
Questions Presented	2
Constitutional Provisions & Statutes	4
Statement of the Case	8
Reasons for Denying the Writ	9
I. The District Court Applied the Proper Rule in Considering Allegations of the Complaints.	10
II. The District Court Properly Dismissed the Complaints for Failure to State a Claim upon which Relief Could Be Granted	10
III. The District Court Lacked Jurisdiction of the Subject Matter of the Complaints.	14
IV. Petitioners' Complaints, to the Extent They Charged Improper Training, Arming and Pro- cedures of the Ohio National Guard, Raised Political Questions that are not Justiciable. ..	18
V. Petitioners' Allegations that Training, Arming and Procedures of the Ohio National Guard were Improper, Indispensably Require Joinder of the United States of America as a Party Defendant.	19
Conclusion	21
Affidavit of Service	22

TABLE OF AUTHORITIES

<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	18, 19
<i>Cherokee Nation v. Georgia</i> , 5 Pet. 1 (1831)	18
<i>Coleman v. Miller</i> , 307 U.S. 433 (1938)	18
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	14
<i>Ex Parte Young</i> , 209 U.S. (1908)	15, 16
<i>Ford Motor Company v. Treasury Department of Indiana</i> , 323 U.S. 459 (1944)	16, 17

<i>Krause, Admr. v. Ohio</i> , 31 O.S. 2d 132 (1972) -----	17
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803) -----	18
<i>Moyer v. Peabody</i> , 212 U.S. 78 (1909) -----	11
<i>Sterling v. Constantin</i> , 287 U.S. 378 (1932) -----	12

STATUTES

Title 28, U.S.C. § 1332 -----	13, 17
Title 28, U.S.C. § 1652 -----	14
Title 32, U.S.C. §§ 108, 110, 501, 701 -----	18, 19, 20
Title 42, U.S.C. § 1983 -----	16
Ohio Revised Code § 5923.37 -----	14, 17

RULES

Rule 7, Federal Rules of Civil Procedure -----	10
Rule 8(d), Federal Rules of Civil Procedure -----	10
Rule 12, Federal Rules of Civil Procedure -----	10
12(b) -----	10, 11, 14, 19
12(b) (1) -----	2, 10, 14
12(b) (6) -----	2, 10
Rule 19, Federal Rules of Civil Procedure --	19, 20, 21
Rule 56(e), Federal Rules of Civil Procedure ----	11

U.S. CONSTITUTION

Article I, Section 8 -----	18, 20
Eleventh Amendment -----	13, 15, 16, 17

OHIO CONSTITUTION

Article I, § 16 -----	14, 17
-----------------------	--------

TEXTS

Moore's Federal Practice -----	14
--------------------------------	----

IN THE
Supreme Court of The United States

October Term, 1972

No. 72-1318

**ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased, *Petitioner,***

vs.

**GOVERNOR JAMES RHODES, SYLVESTER DEL CORSO, and ROBERT CANTERBURY,
*Respondents,***

and

**ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased, *Petitioner,***

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, ALEXANDER STEVENSON AND VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE, *Respondents.*

**BRIEF OF DEFENDANT-RESPONDENT
JAMES A. RHODES IN OPPOSITION**

BRIEF OF OTHER RESPONDENTS ADOPTED

Counsel for Respondent James A. Rhodes (in his individual capacity), which Respondent was Governor of Ohio at the commencement of this action, adopts and incorporates herein the Brief in Opposition to the Peti-

tion filed in this Court by Charles E. Brown, Counsel of Record for the Respondents; Robert F. Howarth, Jr. and William W. Johnston, all of Crabbe, Newlon, Potts, Schmidt, Brown and Jones, Counsel for the Respondents.

In supplement to the statements and arguments therein set forth in behalf of such of the named Respondents as were served with process, Respondent James A. Rhodes (hereinafter referred to as Respondent Rhodes) presents additional grounds why Petitioner's cause should not be reviewed by this Court.

QUESTIONS PRESENTED

1. Respondent Rhodes agrees that the division and restatement of Petitioner's Question #1 as proposed in the Brief of Respondents Del Corso, et al., accurately poses the issues with respect to Motion to Dismiss, grounded respectively on Rules 12(b) (1) and 12(b)(6), Fed. R. Civ. P. The restated questions are

- a) Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12(b)(1), Fed. R. Civ. P. Motion to Dismiss?
- b) Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12(b)(6), Fed. R. Civ. P. Motion to Dismiss?

2. Respondent Rhodes accepts Petitioners' Question #2 as fairly raising the issue whether Amendment XI of the U.S. Constitution denies to the District Court jurisdiction of the subject matter of Petitioners' respective complaints.

3. Respondent Rhodes accepts Petitioners' Question #3 as adequate to present the issue whether Respondent

Rhodes is protected by executive immunity against allegations of the complaints below touching upon his actions taken as Governor of Ohio.

4. Respondent Rhodes denies that Ohio Revised Code §5923.37 "provides for liability" in the circumstances described in Petitioners' Question #4, but despite this defect, accepts Question #4 as a basis for discussing whether the causes of action asserted under diversity jurisdiction reach to Respondent Rhodes.

5. Respondent Rhodes offers the following as his counter-statement of Petitioners' Question #5 for the reason that it presents the issue raised by the decision of the Court of Appeals for the Sixth Circuit:

In an action for damages alleging improper training, arming and procedures of certain Ohio National Guard units, is the United States an indispensable party?

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

UNITED STATES CODE, TITLE 28

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

* * *

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:**Section 1983:**

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION**Article I, Section 16:**

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article III, Section 10:

He [Executive] shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.

Article IX, Section 3:

The governor shall appoint the adjutant general, quartermaster general, and such other staff officers, as may be provided for by law. Majors general, brigadiers general, colonels, or commandants of regiments, battalions, or squadrons, shall, severally, appoint their staff, and captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra*.]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends, may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Ohio Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF THE CASE

Respondent Rhodes concurs with the partial restatement of Petitioners' "Statement of the Case" offered in the Brief of Respondents Del Corso, et al. In particular, Respondent Rhodes would emphasize the following:

1. Affidavits containing the Executive Proclamations calling units of the National Guard to active duty were attached to Respondents' Motion to Dismiss and constituted evidence before the trial court of the need for such action and the nature of the orders issued by Respondent Rhodes.

2. The amended Krause complaint alleges (para. 3):
 "The defendant *Governor James Rhodes* at all times herein mentioned, was the Governor ***", etc. (Emphasis added.)

The Miller complaint alleges (para. 2):

"At all times herein mentioned, defendant Rhodes *** exercised certain powers and authority *** under color of the laws of the State of Ohio *as its agent, servant and employee.*" (Emphasis added.)

3. Respondent Rhodes did not fire, and is not alleged in either complaint to have fired, any shot killing the decedents of either Petitioner.

REASONS FOR DENYING THE WRIT

In the Brief of Respondents Del Corso, et al., Petitioners' Questions are dealt with in this order:

1, 3 & 4, 2 & 4, 5. As Respondent Rhodes' argument supplements and parallels that argument, the same order will be followed herein under the headings:

- I. The District Court Applied the Proper Rule in Considering Allegations of the Complaints.
- II. The District Court Properly Dismissed the Complaints for Failure to State a Claim Upon Which Relief Could be Granted.
- III. The District Court Lacked Jurisdiction of the Subject Matter of the Complaints.
- IV. Petitioners' Complaints, to the Extent They Charged Improper Training, Arming and Procedures of the Ohio National Guard, Raised Political Questions that are not Justiciable.
- V. Petitioners' Allegations that Training, Arming and Procedures of the Ohio National Guard were Improper, Indispensably Require Joinder of the United States of America as a Party Defendant.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE PROPER RULE IN CONSIDERING ALLEGATIONS OF THE COMPLAINTS.

Without specifying it, Petitioners transparently relied on Rule 8(d), Fed. R. Civ. P., as their chief buttress for an erroneous assumption on which their first Question is erected.¹ That assumption is that any allegation in the Complaints not controverted by a responsive pleading must be taken as true. However, Rule 12(b) authorizes the defense that the Court lacks jurisdiction over the subject matter to be presented by motion [12(b)(1)]. Similarly, the same Rule permits presentation by motion [12(b)(6)] the defense that the Complaint fails to state a claim upon which relief can be granted. Respondent Rhodes followed a procedure sanctioned by the Federal Rules in filing his separate Motion to Dismiss in the Krause and Miller cases.

II. THE DISTRICT COURT PROPERLY DISMISSED COMPLAINTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

The second branch of Defendant-Respondent Rhodes' separate Motion to Dismiss in the District Court in the Krause case, pursuant to Rule 12(b)(6), Fed. R. Civ. P., was grounded on the failure of the second cause of action to state a claim on which relief can be granted. Supporting the Motion were the affidavits containing the Executive Proclamations issued April 29 and May 5, 1970. Their inclusion brought into play the last sentence

¹ Rule 8(d) Fed. R. Civ. P.—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

of Rule 12(b) under which a Motion to Dismiss is treated as one for summary judgment and disposed of pursuant to Rule 56.

The sworn evidence produced before the Court by means of the affidavits containing the Executive Proclamations rebutted the allegations of the Complaint and removed any requirement that the Court accept such allegations as true. Subdivision (e) of Rule 56, Fed. R. Civ. P., specifically provides that sworn affidavits can cut down allegations in pleadings. The last two sentences of Rule 56(e) read as follows:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Brief in Opposition to the Petition for Certiorari filed in behalf of Respondents Del Corso, et al., develops generally the scope of executive immunity. So far as Respondent Rhodes is concerned, it should suffice to point out that this Court has unhesitatingly given the protection of absolute immunity to a governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders directed toward that end. Even Judge Celebrezze, in his dissent below, conceded:

"The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive, and in and of itself, is not subject to judicial review." (Scheuer Appendix, 69a.)

What Judge Celebrezze there conceded can fairly be construed to be the import of *Moyer v. Peabody*, 212

U.S. 78 (1909), which, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former governor of Colorado for a trespass. The complaint was dismissed on demurrer. Certiorari was denied, and the Court, speaking by Justice Holmes, said in part:

"As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a State Law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication [the imprisonment ordered in this case]."

Moyer v. Peabody, 212 U.S. 78 at p. 85.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved *Moyer v. Peabody*, *supra*, in these words (Chief Justice Hughes, at page 399):

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace, from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402.)

In the District Court, Petitioners in both the Krause and Miller cases sought to insulate their complaints from dismissal for want of jurisdiction by making extravagant conclusionary allegations that Respondent Rhodes

acted recklessly, willfully, and wantonly. For example, the Krause Amended Complaint alleges:

- "10. The ordering of these improperly trained and armed troops onto the Kent State Campus, on the part of these defendants in complete and utter indifference and disregard for the lives of students on the Kent State Campus, including Plaintiff's decedent Allison Krause, constituted culpable, gross, wanton, and reckless misconduct under the circumstances***." (Pet. Appendix 49.)
- "11. * * * Suddenly and without warning and without cause or justification, National Guard Troops fired live ammunition at a large group of students and people, intentionally, willfully, wantonly and maliciously disregarding the lives and safety of the students * * * including Allison Krause * * *." (Pet. Appendix 49.)

Similarly, the Miller complaint alleges:

- "8. * * * these defendants intentionally, recklessly, willfully and wantonly engaged in the following acts among other things which caused or contributed to the causing of the deprivations alleged * * *." (Pet. Appendix 54.)

Such extravagant and unjustified accusations were instantly negated by facts of which the District Court took judicial notice, triggered by the incorporation into the Motion to Dismiss of Respondent Rhodes' Proclamations as Governor on April 29 and May 5, 1970, reciting the necessities that gave rise to the use of National Guard Troops in aid of the civil authorities.

Petitioners' wrongful death actions brought under 28 U.S.C. §1332 are subject to the same arguments arising out of Eleventh Amendment immunity to suit as have heretofore been advanced with respect to the

deprivation of civil rights actions. To avoid repetition, the arguments are simply referred to and adopted. Moreover, under the rule of *Erie R. Co. v Tompkins*, 304 U.S. 64 (1938) and the provisions of 28 U.S.C. §1652, Federal Courts in Ohio must follow Ohio's immunity to suit under its own Constitution (Article I, §16) and its own case law. For full development of this argument, which governs with respect to diversity jurisdiction claims against Respondent Rhodes, reference is made to the Brief In Opposition filed herein in behalf of Respondents Del Corso, et al.

Petitioners have asserted a waiver of immunity and a consent to suit by force of §5923.37, Ohio Revised Code. These assertions are also well answered in the Brief in Opposition filed by Respondents Del Corso, et al, and the answers apply equally to Respondent Rhodes. Furthermore, as is developed later herein in the discussion of lack of subject matter jurisdiction, neither the status nor conduct of Respondent Rhodes is embraced by the language of §5923.37.

III. THE DISTRICT COURT LACKED JURISDICTION OF THE SUBJECT MATTER OF THE COMPLAINT.

The first branch of Defendant-Respondent Rhodes' separate Motion to Dismiss both causes of action in the Krause case and the first cause of action in the Miller case pursuant to Rule 12(b)(1), Fed. R. Civ. P., was based upon the Court's lack of jurisdiction of the subject matter. *Moore's Federal Practice* in its treatment of Rule 12(b) motions describes the type filed by respondent Rhodes as a "speaking motion," one that to be sustained requires reference to facts not appearing on the face of the pleading attached. The facts needed were supplied in the sworn affidavits embracing the

Executive Proclamations issued by respondent Rhodes as Governor of Ohio on April 29 and May 5, 1970. With the Proclamations before it, the Court was enabled to take judicial notice of matters of public record and common knowledge with respect to events on the Kent State University campus April 29 through May 4, 1970.

As rebuttal to the content of the sworn Executive Proclamation, petitioners, without identifying the source of the quotation, have quoted extensively (Pet. 11) from material they describe as "conclusions drawn by the United States Department of Justice from the findings of the Federal Bureau of Investigation after an exhaustive inquiry * * *". All such quotations are of unknown source, unsworn and extraneous to the record.

The Brief in Opposition filed by Respondents Del Corso, et al. develops in detail the doctrine of sovereign immunity as applied to the facts in these cases. That Brief stresses and documents that the immunity of a State to suit by citizens of another State cannot be bypassed by naming personal party defendants when the action essentially affects the State. The petitioners assert that opinions of the District Courts "disregard the established holding of this Court in *Ex parte Young*, 209 U.S. 123 (1908) where it was held that the immunity of a State provided in the Eleventh Amendment did not extend to a state official charged with violating the Federal Constitutional Rights of citizens." (Pet. 16) However, *Ex Parte Young* lays down a principle so much narrower than asserted that the Court of Appeals correctly found the case to be "inapposite." (Scheuer Pet 12a.) What *Ex Parte Young* stands for is that " * * * individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence

proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." *Ex Parte Young*, 209 U.S. 123 at 155. As Chief Judge Weick observed in the Court of Appeals' opinion herein, "*Ex Parte Young* * * * was an action for injunction * * *. Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and protect the public." (Scheuer Pet. 12.) Moreover, Governor Rhodes' calling out the National Guard on April 29, 1970, constituted a completed exercise of office, and thus a completed act of the State, not a threatened action "under cover of law."

The petitioners suggest that the question is raised "* * * whether U.S.C. Title 42, Section 1983 is unconstitutional because it violates the Eleventh Amendment." (Pet. 18.) Clearly, it is not rendered unconstitutional by the Eleventh Amendment, but its use is properly limited by that amendment. As Senior Circuit Judge O'Sullivan said in his concurring opinion below, "in this case, we deal again with the ever-widening employment of Section 1983 for a purpose 'not plainly apparent from its language,' as such language was employed by the Congress when it adopted the Section in 1871 to combat some of the wrongs of our post-Civil War society. (Scheuer Pet. 27a)

As one of the decisions that the petitioners claim to have "adumbrated" the principle of *Ex Parte Young*, supra, *Ford Motor Company vs. Treasury Department of Indiana*, 323 U.S. 459 (1944) is cited. While the case

may adumbrate, it does not support the principle argued for by petitioners. The action in *Ford Motor Company* was held to be against the state and not maintainable because the state had not consented to sued.

The Brief in Opposition filed by Respondents Del Corso, et al, previously adopted in behalf of Respondent Rhodes, clearly documents the bar of the Eleventh Amendment to the petitioners' causes of action asserted under diversity jurisdiction. (28 U.S.C. Section 1332). Moreover, as that Brief points out, petitioners would have no right of recovery under Ohio's own law, in particular Article 1, Section 16 of the Constitution of Ohio, as applied in a parallel case, *Krause Administrator vs. Ohio*, 31 O.S. 2d 132, 285 NE 2d 736, appeal denied, 34 L. Ed. 2d 506; Petition for Rehearing denied, 35 L. Ed. 2d 208 (1972).

Without distinguishing between Respondent Rhodes who, by force of the Constitution of Ohio was, *ex officio*, Commander in Chief of its organized militia, and the other Respondents who became officers and enlisted members of the militia pursuant to statute, petitioners have asserted a right to recover pursuant to Section 5923.37, Ohio Revised Code. Without conceding that the thrust of that statute is to waive sovereign immunity under the facts of these cases, Respondent Rhodes points out that his status and conduct were not embraced within the language of the statute: (1) He was not ordered "to duty by state authority" but was the public officer through whom the state authority was exercised. (2) He took none of the actions complained of "at the scene of" the Kent State University area of disorder. (3) No act of respondent Rhodes can sensibly be characterized as "one of willful or wanton misconduct."

IV. PETITIONERS' COMPLAINTS, TO THE EXTENT THEY CHARGE IMPROPER TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD, RAISE POLITICAL QUESTIONS THAT ARE NOT JUSTICIABLE.

Reference is again made to the Brief in Opposition filed on behalf of Respondents Del Corso, et al, in this instance for its discussion of the non-justiciability of a political question.

The federal cases have for years yielded to the executive the decision of political questions. Typical of the cases have been *Cherokee Nation vs. Georgia*, 5 Pet. 1; *Marbury vs. Madison*, 1 Cranch 137; and *Coleman vs. Miller*, 307 U.S. 433. Then came Justice Brennan's opinion in *Baker vs. Carr*, 396 U.S. 186 (1962) that seemed to settle for all time that a case like the Krause and Miller cases against Respondent Rhodes must be treated as non-justiciable because a decision to call out the National Guard is "political".

Article I, Section 8, Clause 16 of the U. S. Constitution empowers Congress to "provide for organizing, arming and disciplining the Militia; * * * reserving to the States, respectively, the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress." Congress has so provided in Title 32, United States Code, and has stated that:

"— a state that does not comply with Title 32 shall lose its National Guard money" (Section 108);

"The President shall be the source of regulations and orders to organize, discipline, and govern the National Guard" (Section 110);

"— the discipline, including training, of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force" (Section 501);

"— the Army and Air National Guard shall use Army and Air Force type uniforms, respectively" (Section 701).

It is therefore clear that Respondent Rhodes' calling out the National Guard was in a context containing the indicia of a political question as defined by Justice Brennan: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * *" *Baker vs. Carr*, 369 U.S. 186 at 217 (1962). In this instance the "coordinate political department" is the Executive, i.e., the Presidency.

The Brief in Opposition filed in behalf of Respondents Del Corso, et al., quotes the criteria for determining the existence of a political question as listed by this Court in *Baker v. Carr*, 369 U.S. 186 at 217 (1962). The Brief then demonstrates, point by point, how every criterion has application to the two cases at bar. The conclusion is inescapable that both the Krause and Miller cases present political issues that are non-justiciable.

V. PETITIONERS' ALLEGATIONS THAT TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD WERE IMPROPER INDISPENSABLY REQUIRE JOINDER OF THE UNITED STATES OF AMERICA AS A PARTY-DEFENDANT.

Speaking for the majority in the Sixth Circuit consideration of these cases, Judge Weick stated:

"It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12b and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the train-

ing and weaponry of the Guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the Court. The United States has not consented to be sued." (Scheuer, 190)

In the view of Petitioners, Judge Weick wrongly concluded that because of the involvement of the United States in the training of the National Guard, the United States was required to be named a defendant. Petitioners' theory is that inasmuch as Peitioners did not state in their complaints that the United States government or federal officials were involved, as stated by Judge Weick, there is no way to arrive at the conclusion that they were in fact so involved. Such a notion ignores Article I, Sec. 8, Clause 16, of the United States Constitution, which, after providing that Congress shall have power to provide for the organizing, arming, disciplining and governing of the militia, reserved to the states the appointment of officers and the "authority of training the Militia according to the discipline prescribed by Congress." It likewise ignores relevant provisions of Title 32, United States Code, such as Section 108, providing that a state that does not comply with Title 32 shall lose its National Guard money; Section 110, providing that the President shall be the source of regulations and orders to organize, discipline and govern the National Guard; Section 501, providing that the discipline and training of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force.

Rule 19(a), Fed. R. Civ. P., states in pertinent part:

"A person *** shall be joined as a party in the action if *** he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may *** leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his

claimed interest. If he has not been so joined, the Court shall order that he be made a party."

Rule 19(b) provides in pertinent part:

"If a person as described *** cannot be made a party, the court shall determine whether in equity and good conscience the action *** should be dismissed, the absent person being thus regarded as indispensable. ****"

The provisions of the United States Constitution, Title 32 of the United States Code, and the Federal Rules of Civil Procedure are all matters of which the court takes judicial notice. The court likewise notes that the United States government, which is so intricately interwoven in the training, arming and discipline of the Guard, is indispensably a party and has not consented to be sued. Under the circumstances, Judge Weick reached the only possible conclusion, namely, he required dismissal of the actions.

When Petitioners assert that "any bar to this action premised upon the failure of the United States to consent to suit violates the due process and equal protection clauses of the XIV Amendment", they are arguing in a circle. What they are saying is that it is unconstitutional under the XIV Amendment for the sovereignty created by the United States Constitution to possess one of the attributes of sovereignty, namely, an immunity to suit in its own courts.

CONCLUSION

The cases of Petitioners Krause and Miller present no federal question of substance for review by this Court. Therefore, the writ prayed for should be denied.

Respectfully submitted,

R. BROOKE ALLOWAY

Counsel of Record for

Respondent James A. Rhodes

AFFIDAVIT OF SERVICE

State of Ohio

SS:

County of Franklin

I, R. Brooke Alloway, Senior Partner in the firm of Topper, Alloway, Goodman, DeLeone and Duffey, Counsel of Record for Respondent James A. Rhodes herein, hereby certify that on this 30th day of April, 1973, I served three copies of the foregoing *Brief of Defendant-Respondent James A. Rhodes in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit* on Steven A. Sindell and Joseph M. Sindell of Sindell, Sindell, Bourne, Stern & Spero, 1400 Leader Building, Cleveland, Ohio 44114, Attorneys for Petitioners Elaine B. Miller and Arthur Krause; Joseph Kelner of Kelner, Stelljes and Glotzer, 217 Broadway (Suite 600), New York, New York, 10007, Attorney for Petitioner Elaine B. Miller; Charles E. Brown, 42 East Gay Street, Columbus, Ohio 43215, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin, Srp and White; Delmar Christensen, Second National Bank Building, Akron, Ohio, 44308, Attorney for Harry D. Jones and John E. Martin, Respondents herein; and C. D. Lambrose, 750 Prospect Avenue, Cleveland, Ohio, 44115, Attorney for Raymond J. Srp, Respondent herein, by depositing the same in a United States mail box, first class postage prepaid (and in the instance of Kelner, with air mail postage prepaid), addressed to each of the attorneys above at his designated

address, being the only parties hereto required to be served.

R. BROOKE ALLOWAY
Counsel of Record for
Respondent James A. Rhodes

Subscribed and sworn to before me this 30th day of
April, 1973.

JOHN M. McELROY,
Attorney at Law,
Notary Public—State of Ohio
My commission has no
expiration date.
Sec. 147.03, Ohio Revised Code

LIBRARY
SUPREME COURT, U. S.

FILED

MAY 3 1973

MICHAEL BOBIAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased, Petitioner,

vs.

GOVERNOR JAMES RHODES, SYLVESTER DEL
CORSO, and ROBERT CANTERBURY,
Respondents,

and

ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased, Petitioner,

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, ALEXANDER STEVENSON AND
VARIOUS OFFICERS AND ENLISTED MEN AND
ROBERT WHITE, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY,
JONES, MARTIN, SRP, AND WHITE
IN OPPOSITION

CHARLES E. BROWN, Counsel of Record
ROBERT F. HOWARTH, JR., Of Counsel
WILLIAM W. JOHNSTON, Of Counsel
42 East Gay Street
Columbus, Ohio 43215

(Continued Inside Front Cover)

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES _____	iii
QUESTIONS PRESENTED _____	1
CONSTITUTIONAL PROVISIONS AND STATUTES _____	3
STATEMENT OF CASE _____	9
SUMMARY OF ARGUMENT _____	11
ARGUMENT _____	12
I. The Lower Court Properly Considered the Complaints' Allegations _____	12
A. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ. P., motion to dismiss? _____	12
B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ. P., motion to dismiss? _____	13
II. The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted _____	15
A. Respondent, Governor James A. Rhodes. _____	16
1. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts <i>vis-à-vis</i> a 42 U.S.C. Section 1983 cause of action? ... _____	16
2. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts <i>vis-à-vis</i> a wrongful death cause of action brought under diversity jurisdiction? _____	16
B. The Remaining Respondents _____	16

1. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess <i>qualified</i> executive immunity <i>vis-à-vis</i> a 42 U.S.C. Section 1983 cause of action? _____	16
2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess <i>qualified</i> executive immunity <i>vis-à-vis</i> a wrongful death action brought under diversity jurisdiction? _____	19
III. The Trial Court Lacked Subject Matter Jurisdiction _____	21
A. Petitioners' Title 42 U.S.C. §1983 Causes of Action; Title 28 U.S.C. §§1331, 1343 _____	21
B. Petitioners' Wrongful Death Causes of Action; Title 28 U.S.C. §1332. _____	31
C. Section 5923.37, Ohio Revised Code. _____	33
IV. The Allegations of Petitioners' Complaints Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Justiciable Political Questions. _____	34
V. The Federal Government Is an Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard. _____	39
CONCLUSION _____	42
APPENDIX _____	44
AFFIDAVIT OF SERVICE _____	46

TABLE OF AUTHORITIES

CASES	Page
<i>Adams v. Pate</i> , 445 F.2d 105 (7th Cir. 1971)	21
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	35, 36
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959)	19, 25, 27, 33
<i>Bershad v. Wood</i> , 290 F.2d 714 (9th Cir. 1961)	19
<i>Birnbaum v. Trussel</i> , 347 F.2d 86 (2nd Cir. 1965)	17, 18
<i>Blackburn v. Fisk University</i> , 443 F.2d 121 (6th Cir. 1971)	14
<i>Blitz v. Boog</i> , 328 F.2d 596 (2nd Cir. 1964), cert. denied, 379 U.S. 855 (1965)	19
<i>Brownfield v. Landon</i> , 307 F.2d 389 (D.C. Cir. 1962), cert. denied, 371 U.S. 924 (1962)	19
<i>Carter v. Carlson</i> , 447 F.2d 358 (D.C. Cir. 1971), cert. granted sub nom.	17, 18
<i>Dalehite v. United States</i> , 346 U.S. 15 (1953)	19
<i>David v. Cohen</i> , 407 F.2d 1268 (D.C. Cir. 1969)	19
<i>District of Columbia v. Carter</i> , 404 U.S. 1014 (1972) ..	
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963)	22, 23, 24, 27, 29, 30, 31, 40
<i>Dunham v. Crosby</i> , 435 F.2d 1177 (1st Cir. 1970)	21
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	31
<i>Ex parte New York</i> , 256 U.S. 490 (1921)	22, 23, 30
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	28, 30
<i>Ford Motor Co. v. Treasury Department</i> , 322 U.S. 459 (1944)	22, 28, 29, 30, 34
<i>Fortier v. Hoby</i> , 262 F.2d 924 (D.C. Cir. 1959)	19
<i>Franklin v. Meredith</i> , 386 F.2d 958 (10th Cir. 1967)	18
<i>Garner v. Rothburn</i> , 346 F.2d 55 (10th Cir. 1965)	19
<i>Georgia R. and Bkg. Co. v. Redwine</i> , 342 U.S. 299 (1952)	28
<i>Gilbert v. David</i> , 235 U.S. 561 (1915)	13
<i>Great Northern Life Insurance Co. v. Read</i> , 322 U.S. 47 (1944)	34
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2nd Cir. 1949), cert. denied, 339 U.S. 949 (1950)	19, 25, 27, 33
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	22
<i>Hoffman v. Halden</i> , 268 F.2d 280 (9th Cir. 1959)	18
<i>Howard v. Lyons</i> , 360 U.S. 593 (1959)	19

	Page
<i>International Bk. of Miami v. Banco de Economias y Prestamos</i> , 55 F.R.D. 180 (1972).....	14
<i>Interstate Nat. Gas Co. v. Southern California Gas Co.</i> , 209 F.2d 380 (9th Cir. 1953).....	14
<i>Jobson v. Henne</i> , 355 F.2d 129 (2nd Cir. 1966).....	17, 18
<i>Jones v. Perrigan</i> , 459 F.2d 81 (6th Cir. 1972).....	17, 18
<i>Joseph v. Rowlen</i> , 402 F.2d 367 (7th Cir. 1968).....	17, 18
<i>Krause Admr. v. Ohio</i> , 31 Ohio St.2d 132, 285 L.Ed.2d 736 (1972).....	31, 34
<i>Land v. Dollar</i> , 330 U.S. 731 (1947).....	40
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1938).....	29
<i>Larson v. Domestic and Foreign Commerce Corp.</i> , 337 U.S. 682 (1949).....	40
<i>Lee Turzillo Contr. Co. v. Cincinnati Met. Hous. Auth.</i> , 10 Ohio St. 2d 5, 225 N.E.2d 255 (1967).....	34
<i>Lumbermans Mutual Casualty Company v. Rhodes</i> , 403 F.2d 2 (10th Cir. 1968), cert. denied, 394 U.S. 965 (1969).....	18
<i>Magnum v. Coty</i> , 262 U.S. 159 (1923).....	42
<i>Martin v. Mott</i> , 25 U.S. (12 Wheat.) 19 (1927).....	29
<i>Maryland v. United States</i> , 381 U.S. 41 (1965).....	21
<i>McLaughlin v. Tilendis</i> , 398 F.2d 287 (7th Cir. 1968).....	17, 18
<i>McNutt v. General Motors Accept. Corp.</i> , 298 U.S. 178 (1935).....	13
<i>Meredith v. Allen County War Memorial Hospital Commission</i> , 397 F.2d 33 (6th Cir. 1968).....	17, 18
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	29
<i>Morgan v. Rhodes</i> , 456 F.2d 608 (6th Cir. 1972), cert. granted sub nom., <i>Gilligan v. Morgan</i> , U.S. , 34 L.Ed.2d 217 (1972).....	35
<i>Nev.-Cal. Electrical Securities Co. v. Imperial Irr. District</i> , 85 F.2d 886 (9th Cir. 1936), cert. denied, 300 U.S. 662 (1937).....	14
<i>North Pacific Steamship Co. v. Soley</i> , 257 U.S. 216 (1921).....	13
<i>O'Campo v. Hardisty</i> , 262 F.2d 621 (9th Cir. 1958)....	19
<i>Orloff v. Willoughby</i> , 345 U.S. 83 (1952).....	39
<i>Ove Gustavsson Contracting Co. v. Floete</i> , 299 F.2d	

	Page
655 (2nd Cir. 1962), cert. denied, 374 U.S. 287 (1963)	19
<i>Parden v. Terminal R. of Alabama Docks Dept.</i> , 377 U.S. 184 (1964)	22
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	18
<i>Re Ayers</i> , 123 U.S. 443 (1887)	22, 23
<i>Roberts v. Williams</i> , 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 (1971)	17, 18
<i>Scheuer, etc. v. Rhodes, et al.</i> , United States Supreme Court, Case No. 72-914	1, 2
<i>Shaugnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	41
<i>Silver v. Dickson</i> , 403 F.2d 642 (9th Cir. 1968)	18
<i>Sostre v. McGinnis</i> , 442 F.2d 178 (2nd Cir. 1971)	17, 18
<i>Spalding v. Vilas</i> , 161 U.S. 483 (1896)	19
<i>State, ex rel. Williams, v. Glander</i> , 148 Ohio St. 188, 74 N.E. 2d 82 (1947)	32, 33
<i>Tindal v. Wesley</i> , 167 U.S. 204 (1897)	23
<i>United States v. Tarumianz</i> , 141 F. Supp. 739 (1956)	18
<i>Wetmore v. Rymer</i> , 169 U.S. 115 (1898)	13
<i>Whirl v. Kern</i> , 407 F.2d 781 (5th Cir. 1968)	17, 18

CONSTITUTIONS, STATUTES, AND RULES

United States Constitution:

Article I, Section 8, Clause 16	36
Article VI	27, 30
Amendment XI	passim
Amendment XIV	31

United States Code:

Title 28

Section 1331	22
Section 1332	passim
Section 1343	22
Section 1652	31
Section 2680	19

Title 32

Section 108	36
Section 110	36
Section 501	36, 38
Section 701	36, 38

	<i>Page</i>
Title 42	
Section 1983	<i>passim</i>
Federal Rules of Civil Procedure	
Rule 12b	<i>passim</i>
Rule 12h	12, 13
Rule 19	40, 41
Rule 56	10, 13, 14, 15
Rules of the Supreme Court of the United States	
Rule 19	42
Ohio Constitution	
Article I, Section 16	9, 11, 20, 21, 31, 43
Article III, Section 10	24
Article IX, Section 3	24
Article IX, Section 4	24
Ohio Revised Code:	
Section 3341.01	25
Section 3341.02(B)	25
Section 3341.04	25
Section 5919.02	24
Section 5919.05	24
Section 5923.21	25
Section 5923.22	25
Section 5923.231	25
Section 5923.37	20, 21, 33, 34
Section 5923.99(A)	25

TEXTS AND ARTICLES

32 Am. Jur. 2d, <i>Federal Practice and Procedure</i> , Sections 170-172 (1967)	13
II, Harper and James, <i>Law of Torts</i> , Section 29.8 (1956)	21
Wiener, <i>The Militia Clause of the Constitution</i> , 54 Harv. L.Rev. 181 (1940)	36
5 C. Wright and A. Miller, <i>Federal Practice and Procedure</i> , Civil Section 1350 (1967)	13
Comment, <i>Civil Liability of Subordinate State Offi- cials Under the Federal Civil Rights Acts and The Doctrine of Official Immunity</i> , 44 Calif.L.Rev. 887 (1956)	18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased, *Petitioner*,

vs.

GOVERNOR JAMES RHODES, SYLVESTER DEL
CORSO, and ROBERT CANTERBURY,
Respondents,

and

ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased, *Petitioner*,

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, ALEXANDER STEVENSON AND
VARIOUS OFFICERS AND ENLISTED MEN AND
ROBERT WHITE, *Respondents*.

**BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY,
JONES, MARTIN, SRP, AND WHITE
IN OPPOSITION**

QUESTIONS PRESENTED¹

1. Respondents are not satisfied with petitioners' first

¹Although the Krause and Miller petition for a writ of certiorari raises diversity jurisdiction issues, the remaining questions are conterminous with those considered by the Scheuer petition, presently before this Court (*Scheuer, etc. v. Rhodes, et al.*, United States Supreme Court, Case No. 72-914). Therefore, respondents, herein, will follow the organization of the brief in opposition filed in the Scheuer case, *supra*, considering the diversity issues where appropriate.

question (Pet. 3)² in that the question's simplistic approach clouds the issues included therein. The following two questions are more properly brought before this Court under the general heading, "I. The Lower Court Properly Considered the Complaints' Allegations.":

- A. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ.P., motion to dismiss?
- B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ.P., motion to dismiss?

2. Respondents are satisfied with petitioners' second question (Pet. 3) relating to the lower court's subject matter jurisdiction over petitioners' Title 42 U.S.C. Section 1983 causes of action, and will consider the issue under the general heading, "III. The Lower Court Lacked Subject Matter Jurisdiction." The question of the trial court's subject matter jurisdiction over petitioners' diversity causes of action is also considered under this general heading.

3. Respondents are satisfied with petitioners' third question (Pet. 3-4) relating to the doctrine of executive immunity and will consider the issue under the general heading, "II. The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted." The doctrine of executive immunity *vis-à-vis* petitioners' diversity causes of action is also considered under this general heading.

²For purposes of this brief in opposition, "Pet." together with Arabic numerals refers to pages of petitioners' petition for a writ of certiorari, filed herein; "Sch. App." together with Arabic numerals refers to pages of the appendix to the Scheuer petition for a writ of certiorari (*Scheuer, etc. v. Rhodes, et al.*, United States Supreme Court, Case No. 72-914), and incorporated by reference into the Krause and Miller petition herein.

4. Respondents are satisfied with petitioners' fourth question (Pet. 4) relating to their diversity causes of action. The substance of this question will be considered under petitioners' second and third questions as above defined.

5. Respondents are not satisfied with petitioners' fifth question in that the question's substance is not consistent with the holding of the lower court. The following proposition is more properly brought before this Court for review:

- V. The Federal Government Is an Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

UNITED STATES CODE, TITLE 28**Section 1331:**

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded

as rules of decision in civil actions in the courts of the United States, in cases where they apply.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:

Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION

Article I, Section 16:

* * *

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Article III, Section 10:

He (Executive) shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the United States.

Article IX, Section 3:

The Governor shall appoint the Adjutant General, Quartermaster General, and such other staff officers, as may be provided for by law. Majors General, Brigadiers General, Colonels, or Commandants of Regiments, Battalions, or Squadrons, shall, severally, appoint their staff, and Captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The Governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the Militia, to execute the laws of the State, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 3341.01:

The Bowling Green state normal school, and the Kent state normal school, established under 101 O. L. 320, shall be known as the 'Bowling Green State University' and the 'Kent State University,' respectively.

Section 3341.02 (B):

The government of Kent state university is vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate.

Section 3341.04:

The boards of trustees of Bowling Green state university and Kent state university, respectively, shall elect, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary by said boards. The boards shall do all things necessary for the proper maintenance and successful and continuous operation of such universities.

Section 5919.02:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, or arm of the service in which they are appointed.

Section 5919.05:

Commissioned officers of the Ohio national guard shall take and subscribe to the following oath of office: 'I, _____, do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the Governor of the state of Ohio; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of _____ in the National Guard of the United States and of the state of Ohio, upon which I am about to enter, so help me God.'

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra*.]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends; may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.37:

When a member of the organized Militia is ordered to duty by State authority during a time of public danger,

he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Ohio Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF CASE

Respondents are satisfied with petitioners' *resumé* of the case (Pet. 6-8), excepting the adversary comment contained therein and subject to the following two corrections. First, the court of appeals did not hold that, "the *defendants* enjoyed the defense of absolute personal immunity . . . (Pet. 8; emphasis added)." Rather, the lower court held that Respondent Rhodes had absolute immunity (Sch. App. 12a) but that the remaining respondents possessed only a *qualified* personal immunity (Sch.App. 20a). Secondly, petitioners are incorrect when they assert that the lower courts failed to consider their diversity causes of action (Pet. 8). Both the district court (Pet. 37-44) and the court of appeals (Sch.App. 4a-15a) considered the Eleventh Amendment and Article I, Section 16, of the Ohio Constitution which prohibited the federal courts from exercising diversity jurisdiction over petitioners' wrongful death actions.

Additionally, respondents wish to emphasize and bring to this Court's attention certain uncontradicted realities present before the trial court.

1. There were but seven defendants within the personal jurisdiction of the trial court, and upon whom the judg-

ment of the court of appeals is premised; to-wit, Governor Rhodes, Adjutant General Del Corso, Assistant Adjutant General Canterbury, Major Jones, Captains Martin and Srp, and President White (Sch.App. 20a).

2. Presented to the trial court as attachments to respondents' motions to dismiss were relevant Executive Proclamations evidencing that, at the time petitioners' alleged causes of action arose, the Ohio National Guard, including the respondents herein, had been called to active duty pursuant to the law of Ohio (Sch.App. 3a, 23a-26a).³

3. Further, the relevant Executive Proclamations mentioned above factually demonstrated to the trial court that a condition of insurrection and rampage existed at the Kent State University, and that, in response thereto, the Ohio National Guard was ordered by Governor Rhodes to take that action necessary to protect life and property on and to restore order to the Kent State University (Sch. App. 3a; 23a-26a).

4. Petitioners' complaints acknowledge that, at the time petitioners' alleged causes of action arose, the respondents were all agents of the State of Ohio; that respondents were ordered to active duty by the Governor of Ohio; and that none of the respondents herein fired the shots, killing petitioners' decedents (Pet. 47-49, 53-54).

5. Attached to respondents' motion to dismiss in the Krause case were the affidavits of Respondents Del Corso and Canterbury which stated:

"4. At the time plaintiff's alleged cause of action arose, I (Respondent Del Corso) was in Columbus,

³It is to be noted that under respondents' Rule 12b(6), Fed.R.Civ.P., motions to dismiss, applying Rule 56 procedures, the attestations set forth under paragraph 2, 3, and 5, were not contradicted, other than by allegations of the complaint, and therefore must be taken as true under Rule 56 (e).

Ohio, and not on the Kent State Campus (APPENDIX, p. 44 *infra*)."

"4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I (Respondent Canterbury) made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause (APPENDIX, p. 45 *infra*)."

SUMMARY OF ARGUMENT

The ARGUMENT, hereinafter set forth, first considers the allegiance due the allegations of petitioners' complaints when confronted by a Rule 12b(1), Fed.R.Civ.P., motion to dismiss (ARGUMENT, I.A., pp. 12-13 *infra*). Thereafter, a Rule 12b(6), Fed.R.Civ.P., motion to dismiss will be similarly considered and distinguished (ARGUMENT, I.B., pp. 13-15 *infra*).

Secondly, respondents' ARGUMENT will concern the propriety of the lower courts' ruling that (1) petitioners' Title 42 U.S.C. Section 1983 causes of action and (2) petitioners' diversity causes of action failed to state claims upon which relief could be granted; to-wit, the applicability of the doctrine of executive immunity. The substance of this discussion will be considered relative to (A.) Respondent Rhodes, and, thereafter, (B.) relative to the remaining respondents. (ARGUMENT, II., A., B., pp. 15-21 *infra*). Thirdly, and notwithstanding this Court's disposition as to the doctrine of executive immunity issue, the ARGUMENT of respondents will demonstrate that the lower courts lacked subject matter jurisdiction over, both, petitioners' (A.) Section 1983 causes of action and (B.) petitioners' diversity causes of action pursuant to the Eleventh Amendment and Article I, Section 16, of the Ohio Constitution. (ARGUMENT, III., A., B., pp. 21-33 *infra*).

Further, and again separate and independent from the above, the ARGUMENT, hereinafter set forth, demonstrates that certain allegations of petitioners' complaints are properly dismissed since these allegations involve non-justiciable political questions. (ARGUMENT, IV., pp. 34-39 *infra*). Finally, these non-justiciable issues will be shown properly dismissed since the Federal Government is an indispensable party thereto (ARGUMENT, V. pp. 39-41 *infra*).

ARGUMENT

I. The Lower Court Properly Considered the Complaints' Allegations.

The substance of petitioners' first question (Pet. 3) is properly separated and viewed in relation to: (A.) Rule 12b(1), Fed.R.Civ.P., motions to dismiss, and (B.) Rule 12b(6), Fed.R.Civ.P., motions to dismiss. The propriety of this division is apparent from the lower appellate court's affirmance of the complaints' dismissal upon two independent bases; to-wit, the federal courts' lack of subject matter jurisdiction (Eleventh Amendment), and the complaints' failure to state a claim upon which relief can be granted (Executive immunity) (Pet. 7; Sch.App. 20a).

A. Is a United States District Court required to take a complainant's allegations as true when deciding a Rule 12b(1), Fed.R.Civ.P., motion to dismiss?

It is well-established that courts of limited jurisdiction, including the federal courts of this country, may weigh the merits of a motion putting to issue the court's subject matter jurisdiction. Rule 12h(3), Fed.R.Civ.P., endorses this basic precept:

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of

the subject matter, the court shall dismiss the action."

This Court, interpreting the predecessor to Rule 12h(3), stated the rule in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 184 (1935):

"The trial court is not bound by the pleadings of the parties, but may, on its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.'"

See also *Wetmore v. Rymer*, 169 U.S. 115 (1898); *Gilbert v. David*, 235 U.S. 561 (1915); *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921); 5 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil Section 1350 (1969); 32 Am. Jur. 2d *Federal Practice and Procedure* 170-172 (1967).

Hence, notwithstanding petitioners' negative, but unsupported, criticism of the lower courts' factual resolutions (Pet. 9-11, 15) contrary to their complaints' allegations, it is established that the courts were empowered to "inquire into the facts as they really exist(ed)" when considering respondents' Rule 12b(1), motions to dismiss. The determination of the lower court dismissing petitioners' actions for lack of subject matter jurisdiction, pursuant to Rule 12h(3), will hereinafter be considered (ARGUMENT, III. pp. 21-34 *infra*).

B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ.P., motion to dismiss?

The answer to the above posed question is "yes" if proper evidence has not been introduced to contradict the allegations, but "no" if, as in these cases, evidence has been introduced pursuant to the procedures of Rule 56, Fed.R. Civ.P.

Rule 12b, Fed.R.Civ.P., provides that when presented a Rule 12b(6), motion to dismiss, trial courts are to treat evidence introduced therewith in accordance with the procedures of the summary judgment provision. Rule 56(e) states, in no uncertain terms:

" . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the case at hand, there is no question but that relevant Executive Proclamations, sworn to as affidavits, were attached to respondents' Rule 12b(6), motions to dismiss. These affidavits established, *inter alia*, that a condition of insurrection and rampage existed at the Kent State University, May 4, 1970, and that, in response thereto, the Ohio National Guard was ordered by Governor Rhodes to take action necessary to protect life and property on and to restore order to the Kent State University (Sch.App. 3a; 23a-26a).

The federal courts have uniformly held that Rule 12b(6) motions to dismiss admit all *well-pleaded* factual allegations but do not admit legal conclusionary allegations which the courts will judicially notice to be unfounded, i.e., allegations which are unsupported and unsupportable. See, e.g., *International Bk. of Miami v. Banco de Economias y Prestamos*, 55 F.R.D. 180 (1972); *Blackburn v. Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Interstate Nat. Gas Co. v. Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953); *Nev.-Cal. Electrical Securities Co. v. Imperial*

Irr. District, 85 F.2d 886 (9th Cir. 1936), cert. denied, 300 U.S. 662 (1937).

After quoting from the lower courts' decisions, petitioners state:

"It is incredible that such blatant factual assertions are advanced by "federal magistrates, without the benefit of applicable sworn testimony, relying presumably instead upon presentations of this incident in the news media . . ." (Pet. 10; emphasis added)

The "blatant facts" need not have been gleaned by the lower courts through judicial notice since the uncontradicted Executive Proclamations of Governor Rhodes encompassed all the realities of May 4, 1970, of which judicial notice was taken. Because the Executive affidavits were not contradicted by the affirmative evidence provided by Rule 56, the realities, therein disclosed, were properly accepted as true by the lower courts. As stated in Rule 56, "... an adverse party may not rest upon the mere allegations or denials of his pleading . . ." It is important to note that the petitioners' "facts" (Pet. 11-15) were neither presented to the lower court under the terms of Rule 56 nor are they unquestioned realities of which a court could take judicial notice. [Art. II, Rule 201(b), *Proposed Federal Rules of Evidence*, 34 L.Ed. 2d 1, at 12 (1973)].

The propriety of the lower courts' judgment dismissing the complaints pursuant to Rule 12b(6), Fed.R.Civ.P., will next be considered.

II. The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could be Granted.

Petitioners' third reason for allowance of the writ (Pet. 19-21) is predicated upon a conclusion never drawn by the lower court. The court of appeals did not hold that all

respondents possessed absolute immunity to suit. Rather, the majority concluded that, under the facts at bar, Governor Rhodes had *absolute* immunity (Sch.App. 12a) and that the remaining respondents were protected by a *qualified* immunity to petitioners' Section 1983 causes of action (Sch.App. 20a). Thus, the immunity of these state officials will hereinafter be considered in the light of this distinction.

Before considering the specific issues presented, respondents respectfully call this Court's attention to the uncontradicted factual realities before the lower courts. (STATEMENT OF CASE, para. 1-5, pp. 9-11 *supra*)

A. Respondent, Governor James Rhodes.

1. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-d-vis* a 42 U.S.C. Section 1983 cause of action?
2. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-d-vis* a wrongful death action brought under diversity jurisdiction?

These specific issues will be considered in a separate brief in opposition filed on behalf of Respondent, Governor James Rhodes.

B. The Remaining Respondents.

1. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-d-vis* a 42 U.S.C. Section 1983 cause of action?

Petitioners contend that the lower court's executive immunity determination is in conflict with a consistent line of decisions adopting the position that there is no executive

immunity to a Section 1983 cause of action (Pet. 20). Respondents submit that petitioners' statement of law is totally inaccurate.

In support of petitioners' proposition the following cases are cited (Pet. 20): *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1966) (1983 action by an inmate of a state mental institution against officers and supervising psychiatrist of the institution); *Birnbaum v. Trussel*, 347 F.2d 86 (2nd Cir. 1965) (1983 action by doctor against commissioners of city department of hospitals and union president for dismissal on grounds of racial prejudice); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968) (1983 action by doctor against hospital commission and individual commission members); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (1983 action by former probationary teachers against superintendent and elected members of board of education); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968) (1983 action against police officer for false arrest); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) (1983 action against sheriff for holding prisoner in jail after charges had been dismissed); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (1983 action by prisoner against state commissioner of correction and two prison wardens); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), cert. granted sub nom., *District of Columbia v. Carter*, 404 U.S. 1014 (1972) (1983 action against precinct captain and police chief and the District of Columbia); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972) (1983 action by minor prisoner against trusty, youth court judge, municipal court judge, superintendent of county farm, member of board of supervisors of county, county sheriff, and sheriff's officials); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972)

(1983 action against FBI agent for false imprisonment and malicious prosecution).

Looking to these cases cited by petitioner for the proposition that there is a consistent line of decisions adopting the position that there is no executive immunity available against an action brought under Section 1983 (Pet. 14), respondents submit that petitioners' contention is not even remotely supported by the cases cited. Neither *Meredith*, nor *Whirl*, nor *Joseph*, nor *Sostre* (except in the footnote, hardly characterized as the holding of a court) discuss any issue concerning executive immunity and consequently have no relevance to the case at bar. *Jobson*, *McLaughlin*, *Carter*, *Roberts* and *Jones* all recognize the existence of executive immunity as a defense to a Section 1983 action but would apply the immunity sparingly. It must be noted that these cases all recognize the viability of the doctrine of executive immunity under a Section 1983 cause of action. The holding of these cases is entirely consistent with the holding of the lower court herein. The *Birnbaum* case is distinguishable from the case at bar since it was brought on the grounds of racial discrimination which would necessarily involve different policy considerations. See, Comment, *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 Calif. L.Rev. 887 (1956).

Contrarily, a consistent line of cases hold state governmental officials immune to Section 1983 causes of action for discretionary acts done within the scope of their authority. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Lumbermens Mutual Casualty Company v. Rhodes*, 403 F.2d 2 (10th Cir. 1968), cert. denied, 394 U.S. 965 (1969); *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968); *United States v. Tarumianz*,

141 F. Supp. 739 (1956). The policy considerations calling for immunity to be given officials for their discretionary acts are firmly entrenched in previous decisions of this Court and federal appellate courts. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); *Dalehite v. United States*, 346 U.S. 15 (1953); *Spalding v. Vilas*, 161 U.S. 483 (1896); *David v. Cohen*, 407 F.2d 1268 (D.C. Cir. 1969); *Garner v. Rathburn*, 346 F.2d 55 (10th Cir. 1965); *Blitz v. Boog*, 328 F.2d 596 (2nd Cir. 1964), cert. denied, 379 U.S. 855 (1965); *Brownfield v. Landon*, 307 F.2d 389 (D.C. Cir. 1962), cert. denied, 371 U.S. 924 (1962); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2nd Cir. 1962), cert. denied, 374 U.S. 287 (1963); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961); *Fortier v. Hobby*, 262 F.2d 924 (D.C. Cir. 1959); *O'Campo v. Hardisty*, 262 F.2d 621 (9th Cir. 1958); *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), cert. denied, 339 U.S. 949 (1950). These very same policy considerations are statutorily embodied in the Federal Tort Claims Act. Title 28 U.S.C. Section 2680(a). Though the above citations by no means purport to be a complete list of cases recognizing tort immunity for the discretionary acts of governmental officials, the lower court's finding that the complaints failed to state a claim upon which relief could be granted (i.e., the respondents were immune to suits under the facts of the case) can hardly be characterized as a "new extension" of immunity which "plainly flaunts the present law." (Pet. 21).

Respondents submit that the lower court's executive immunity determination, characterized by petitioners as an unabashed departure from established law (Pet. 19), was entirely consistent with the above authorities.

2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General

of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-a-vis* a wrongful death action brought under diversity jurisdiction?

Petitioners first assert that the court of appeals failed to consider their diversity causes of action (Pet. 22). This contention is simply not true. To the contrary, the court of appeals held that federal courts were prohibited from exercising jurisdiction over petitioners' diversity causes of action under both the Eleventh Amendment and the Ohio Constitution, Article I, Section 16 (ARGUMENT, III, A, B., pp. 21-33 *infra*). Secondly, petitioners are incorrect when they assert that Section 5923.37, of the Ohio Revised Code, is a waiver of Ohio's immunity to suit, conferring jurisdiction upon the federal courts (Pet. 23). Section 5923.37 is absolutely unrelated to Ohio's immunity to petitioners' causes of action (ARGUMENT, III, C., pp. 33-34 *infra*).

Assuming, *arguendo*, that the trial court had had jurisdiction over petitioners' diversity causes of action, still their complaints failed to state a claim upon which relief could be granted. To be applicable, Section 5923.37, Ohio Revised Code, requires that the wrongdoer be at the scene of the disorder and that his conduct be willful or wanton. The uncontradicted affidavit of Respondent Del Corso attests to the fact that he was not at Kent State when petitioners' alleged causes of action arose and, therefore, he does not come within the purview of Section 5923.37 (APPENDIX, p. 44 *infra*). Likewise, the affidavit of Respondent Canterbury affirms that he did nothing to cause the fatal shots to be fired and therefore he is outside this section (APPENDIX, p. 45 *infra*).

Further, petitioners' complaints evidence that none of the respondents at bar fired the fatal shots. Members of the Ohio National Guard were agents of the State and not

agents of the respondents at bar. *Maryland v. United States*, 381 U.S. 41 (1965). Consequently, there can be no vicarious liability. *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Dunham v. Crosby*, 435 F.2d 1177 (1st Cir. 1970); II Harper & James *Law of Torts*, §29.8, pp. 1633-1634. The question of whether the actions of those who fired the shots were willful or wanton is clearly foreign to the petition before this Court.

In reality, petitioners are requesting this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the issue of whether Section 5923.37 of the Ohio Revised Code conferred diversity jurisdiction upon the trial court. It is obvious that the diversity question was resolved on the grounds that the suits are barred by the Eleventh Amendment and Article I, Section 16 of the Ohio Constitution. Hence, any decision of the lower court with regard to Section 5923.37 would have been dicta and not determinative of the case. It cannot be over emphasized that petitioners are not presenting a federal question by challenging the constitutionality of Section 5923.37 as repugnant to the United States Constitution, nor are petitioners challenging a lower court's interpretation of the statute as being in conflict with Ohio law. Although there are presently pending numerous Ohio state court wrongful death and personal injury actions arising out of the Kent State tragedy, no Ohio court has yet had the opportunity to interpret Section 5923.37. Surely, this Court is not the proper forum for this section's introduction to judicial scrutiny.

III. *The Lower Court Lacked Subject Matter Jurisdiction.*

A. *Petitioners' Title 42 U.S.C. §1983 Causes of Action; Title 28 U.S.C. §§1331, 1343.*

The trial court's lack of subject matter jurisdiction is separate from and independent of the failure of petitioners'

complaints to state a claim upon which relief can be granted. However, if this Court should determine the doctrine of executive immunity inapplicable to any one of the respondents, the trial court's lack of subject matter jurisdiction becomes even more apparent. This functional reality will be demonstrated herein.

The Eleventh Amendment of the United States Constitution, states:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State."

The Eleventh Amendment, being part of the Supreme Law of the Land, cannot be diminished by congressional enactment. Congress did not and could not expose the states to federal jurisdiction by creating Section 1983 causes of action and providing the corollary jurisdictional provisions (28 U.S.C. §§1331, 1343). *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 186 (1964); *Ex parte New York*, 256 U.S. 490, 497-498 (1921); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

Further, it is established that the Eleventh Amendment cannot be avoided by naming nominal party defendants when the essential nature and effect of the lawsuit affects a sovereign state. *Ford Motor Co. v. Treasury Department*, 322 U.S. 459, 464 (1945); *Ex parte New York*, *supra*, 256 U.S. at 500; *Re Ayers*, 123 U.S. 443, 492 (1887). The relevant criteria for determining when a lawsuit's essential nature and effect results in the action being against a sovereign are well summarized by this Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963):

"The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or inter-

fere with the public administration,' *Lond v. Doller*, 330 U.S. 731, 738, 91 L.Ed. 1209, 1215, 67 S.Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Commerce Corp.*, *supra* (337 U.S. at 704); *Re New York*, 256 U.S. 490, 502, 65 L.Ed. 1057, 1062, 41 S.Ct. 588 (1921)." (Emphasis added)⁴

It is important to note that these "tests" are stated in the disjunctive, and therefore, if any one of the standards is met in a given case, the suit must be held to be against the sovereign. These determinations are relevant and crucial to the achievement of the object and purpose underlying the Eleventh Amendment as defined by this Court in *Re Ayers*, *supra*, 123 U.S. at 505-506:

"The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitu-

⁴Although *Dugan v. Rank*, 372 U.S. 609 (1963) and the tests defined therein, involve the immunity of the Federal Government to suit, the immunity of the States to federal suit is determined by applying the same tests, gauging the impingement of sovereign powers. This conclusion is obvious from the broad language in *Dugan* summarizing the various integrant parts of the rule, and from this Court's citation of *Re New York*, 256 U.S. 490 (1921), an Eleventh Amendment case. See *Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

tional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In accordance with the established law set forth above, the Eleventh Amendment prohibited the trial court from acquiring jurisdiction over petitioners' stated causes of action.

Before the trial court, when ruling upon respondents' Rule 12b(1), motions to dismiss, was the factual matter alleged in petitioners' complaints and contained in the Executive Proclamations attached to the motions (See STATEMENT OF CASE, pp. 9-11 *supra*). Also, present in the trial court was the law of Ohio defining the legal obligations of respondents to the sovereign.⁵ The trial court, weighing these realities (ARGUMENT, I.A. pp. 12-13 *supra*) concluded, under the applicable standards announced by this Court in *Dugan v. Rank*, *supra*, that it was without subject matter jurisdiction. This judgment was entirely consistent with the prior decisions and reasoning of this Court, and demanded by the Eleventh Amendment.

⁵The Ohio Constitution places upon the Governor of Ohio the responsibility of Commander-in-Chief of the Ohio National Guard (Ohio Const. art. III, sec. 10) and the obligation of appointing the Adjutant General and Assistant Adjutant General of the state's Militia (Ohio Const. art. IX, sec. 3). Further, the duty of appointing line and staff officers and ordering them to service when necessary "to execute the laws of the state, to suppress insurrection, and repel invasion," is posited with the Governor (Ohio Const. art. IX, sec. 4).

The statutory law of Ohio states that all commissioned officers of the Ohio National Guard shall be appointed by the Governor, and obligates all commissioned officers to swear their allegiance to the state, and to obey the orders of the Governor (Ohio Rev. Code §§5919.02, 5919.05). The Governor has the sovereign's sanction to order the Ohio National Guard, "to aid civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion..." (footnote continued)

Ohio would be restrained from acting, and the public administration of the law greatly curtailed if the federal courts were to assume jurisdiction over petitioners' causes of action. Although not factually identical, the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), attests to these dire effects:

"... it is impossible to know whether the claim is well founded until the case has been tried, and ... to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. (177 F.2d at 581)"

In the case of *Barr v. Matteo*, 360 U.S. 564 (1959), this Court recognized the inevitable restraint on the sovereign generated by lawsuits against the sovereign's agents:

(Ohio Rev. Code §§5923.21, 5923.231). No officer may refuse to appear when ordered by the Governor to suppress or prevent riot or insurrection (Ohio Rev. Code §5923.22) in accordance with the above. If an officer of the Ohio National Guard fails to obey the Governor's order, he may be fined \$1,000 or imprisoned six months, or both [Ohio Rev. Code §5923.99(A)].

Relative to the status and obligations of Respondent White, President of Kent State University, the statutory enactments of the sovereign designate the Kent State University a state institution (Ohio Rev. Code §3341.01) and vest its government in a board of trustees, appointed by the governor with the advice and consent of the senate [Ohio Rev. Code §3341.02(B)]. Further, this board of trustees is responsible to the sovereign for the election of a president and for the successful operation of the university. The President of Kent State University is, consequently, responsible to the State of Ohio through the board of trustees to do all things necessary for the proper maintenance and successful and continuous operation of such university (Ohio Rev. Code §3341.04).

"We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. (360 U.S. at 564-565)

* * *

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: (Quoting *Gregoire v. Biddle, supra*) (360 U.S. at 571)

* * *

"It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be

prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings. (360 U.S. at 576)"

Under the reasoning of *Gregoire and Berr*, the State of Ohio would be restrained from acting in time of rampage and insurrection, and the public administration of this sovereign's laws would be greatly impeded if the federal courts were to assume subject matter jurisdiction over petitioners' causes of action. On balance, before the trial court, was the State of Ohio's ability to protect life and property within her bounds.

If in times of insurrection and emergency demanding discretionary acts, Ohio's public officials, functioning under their unchallenged obligation to the sovereign, could, at the stroke of a vindictive plaintiff's pen, be subjected to the irrationality of hindsight and *ex post facto* speculation, this sovereign would be hard pressed to find responsible officials to act. This reality, manifest in the trial court and court of appeals, prohibited the federal court from acquiring subject matter jurisdiction over petitioners' actions. If this Court were to determine that the doctrine of executive immunity is not available to shield executive officials from the inevitable lawsuits, the adverse effects upon the sovereign become even more demonstrable.

Rather than departing from the established law, the lower courts' judgment was mandatory: under the facts at bar; in accordance with the Eleventh Amendment; the object and purpose behind this Amendment; and the tests announced by this Court in *Dugan v. Rank*, *supra*. The trial court, balancing the facts at bar, was bound by the Supreme Law of the Land.

Ex parte Young, 209 U.S. 123 (1908), established a much narrower rule than advanced by petitioners, and the dissenting judge in the court of appeals. That case stands for the limited proposition that,

"... individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and *who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.*" *Ex parte Young*, *supra*, 209 U.S. at 155-156 (Emphasis added).

Young, of course, involved an injunction action brought against a state's attorney general seeking to prohibit the *in futuro* enforcement of an unconstitutional state statute. Under the fiction that a state never acts unconstitutionally, this Court held that the injunction was against the attorney general acting on his own frolic. Petitioners' actions are readily distinguishable. Petitioners' lawsuits demand an *ex post facto* evidentiary hearing which, as shown above, is the very evil that would seriously affect Ohio's ability to protect life and property within the state. Further, the fiction of *Young* is irrelevant since the law of Ohio, obligating respondents to act at Kent State University, is not being constitutionally challenged.

The same irrelevancy to the cases at bar characterizes *Georgia R. and Bkg. Co. v. Redwine*, 342 U.S. 299 (1952). In the *Georgia* case, as in *Young*, this Court held that an injunction action, against a state official, to prevent the threatened enforcement of an unconstitutional state statute did not violate the Eleventh Amendment. *Georgia R. and Bkg. Co. v. Redwine*, *supra*, 342 U.S. at 305. *Ford Motor Co. v. Treasury Department*, *supra*, however, was de-

terminated by this Court to be an action affecting the fiscal integrity of Indiana, and consequently barred by the Eleventh Amendment. *Ford Motor Co. v. Treasury Department*, *supra*, 323 U.S. at 464. There is no language in *Ford* that even implies that the "nature and effect" test is limited to fiscal considerations and therefore, this case is entirely consistent with the diverse tests of *Dugan v. Rank*, *supra*. Petitioners also cite a motley group of lower court cases (Pet. 17) involving the Eleventh Amendment *vis-à-vis* Section 1983 causes of action. In order not to belabor the point, it can be said generally that in none of these decisions is there any indication that the courts were presented a factual situation analogous to the one at bar, nor do these cases in any way challenge the established law discussed herein.

Judge Celebreeze, dissenting in the court of appeals, concludes that, because petitioners' actions neither seek money damages from the state's treasury nor interfere with Ohio's contract rights, their claims cannot "affect" this sovereign (Sch.App. 41a).⁶ Such a narrow approach not only ignores the expressed standards in *Dugan v. Rank*, *supra*, but is lacking in logic.

This Court, on numerous occasions, has identified the most important function of government to be providing security for the citizenry and the protection of their property. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (dissenting opinion, White, J.); *Lanzetta v. New Jersey*, 306 U.S. 451, 455 (1938); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1927). Further, as recognized by the dissenting judge, this Court has expressly held that if a

⁶Petitioners advance substantially the same argument, however, they limit the "affect" test even further by including therein only actions which seek judgments against the states' treasuries (Pet. 16-17).

suit seeks damages from a state's treasury (*Ford Motor Co. v. Department of Treasury, supra*) or seeks to compel a state to specifically perform its contract obligations (*Ex parte New York, supra*), the suit must be declared violative of the Eleventh Amendment, notwithstanding the fact that the state was not a named party to the lawsuit. Even ignoring the expressed tests of *Dugan v. Rank, supra*, it most surely follows that if the state's fiscal integrity and immunity to contract obligations are protected, the highest function of state government will be even more zealously insured.

Finally, petitioners' argument that the lower courts' judgment "effectively emasculates the Civil Rights Act of 1871" is incredible (Pet. 17-19). At the time Congress enacted this Civil Rights Act, the Act was either already limited by the Eleventh Amendment, or the Supremacy Clause was negated by Congressional dictate. The dilemma of petitioners has been resolved in the past. There is, of course, the doctrine of *Ex parte Young, supra*, which permits federal mandate to enjoin the enforcement of unconstitutional state statutes. When allegations of a complaint, however, fail to come within the limits of the *Young* doctrine, each factual situation must be analyzed separately; i.e., the tests of *Dugan v. Rank, supra*, must be applied to the circumstances predicated each complaint, with the balance adjudged by the trial court. In those cases in which the trial court determines, as here, that a claimant's Section 1983 action diminishes the object and purpose of the Eleventh Amendment, the complaint must yield to the Supreme Law, and the court must conclude that it is without subject matter jurisdiction.

Petitioners state that,

"... the Eleventh Amendment is at minimum qualified by the subsequent passage of the Four-

teenth Amendment with respect to the rights of due process of law and equal protection of the laws (Pet. 18-19)."

The logical extension of this proposition is that a sovereign state could be sued *directly* for any alleged act contrary to a citizen's rights to due process or equal protection under the Fourteenth Amendment. The absurdity of this conclusion speaks for itself.

B. *Petitioners' Wrongful Death Causes of Action; Title 28 U.S.C. §1332.*

Initially, respondents incorporate, herein, the first section of this argument (ARGUMENT, III, A., pp. 21-31 *infra*) since Ohio's Eleventh Amendment immunity to suit is dispositive of not only petitioners' Section 1983 causes of action but also petitioners' wrongful death actions brought pursuant to the federal courts' diversity jurisdiction. In addition, the immunity of Ohio, under the Ohio substantive law, is controlling in Ohio's federal fora. Title 28 U.S.C. §1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Article I, Section 16 of the 1851 Constitution of Ohio, as amended in 1912, states in relevant part:

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Recently, in another lawsuit arising out of the Kent State tragedy, this Court and the Supreme Court of Ohio, had occasion to consider this provision of the Ohio Constitution. In the case of *Krause Admr. v. Ohio*, 31 Ohio St. 2d 132, 285 N.E. 2d 736, *appeal denied*, U.S. , 34 L.Ed.2d 506; *pet. for reh. denied*, U.S. , 35 L.Ed.2d 208, the Ohio Supreme Court ruled in its syllabus:

"1. The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102; *Palumbo v. Indus.*

Comm., 140 Ohio St. 54, 42 N.E.2d 766; *State, ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82; and *Wolf v. Ohio State Univ. Hospital*, 170 Ohio St. 49, 162 N.E.2d 475, approved and followed.)

* * *

"3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, which provides that ' * * * Suits may be brought against the state in such courts and in such manner, as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such suit. (*Raudabaugh, Palumbo, Williams and Wolf, supra*, approved and followed.)

* * *

"4. Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Therefore, even ignoring the Eleventh Amendment, it is established, and recently confirmed, that Ohio is immune to suit in its state courts. Consequently, under the same Ohio law, the State cannot be sued in the United States District Courts sitting in Ohio.

The Ohio case of *State, ex rel. Williams, v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947) is analogous to the federal law affirmed in *Dugan v. Rank, supra*. In *Glander*, the Ohio Supreme Court, quoting and adopting 42 *American Jurisprudence*, 304, Section 92, stated the Ohio test for determining when an action is against the state, brought through nominal party defendants:

"While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its

official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the state is a necessary party defendant, and if it cannot be made a party, that is, if it has not consented to be sued, the suit is not maintainable. The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court." (*State, ex rel. Williams, v. Glander, supra*, 148 Ohio St. at 193).

Under analogous reasoning as that contained in *Gregoire v. Biddle, supra*, and *Barr v. Matteo, supra*, it is apparent that, pursuant to the tests defined in the *Glander* case, Ohio is "vitally interested" in petitioners' diversity actions, and that "the rights (and obligations) of the state would be directly and adversely affected by the judgment." Hence, in accordance with the established law of Ohio, the State is immune to petitioners' diversity causes of action.

C. Section 5923.37, Ohio Revised Code.

Referring to Section 5923.37, Ohio Revised Code, petitioners declare that "this statute supercedes and waives any immunity otherwise available to the State of Ohio (Pet. 23)." Section 5923.37 provides:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil lawsuit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct." (Emphasis added)

The rule of construction, under both the federal and state law, is established that alleged statutory consents of

the sovereign to suit are to be strictly construed. See, e.g., *Ford Motor Co. v. Treasury Department*, *supra*, 323 U.S., at 465; *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Lee Turzillo Contr. Co. v. Cincinnati Met. Hous. Auth.*, 10 Ohio St.2d 5, 225 N.E.2d 255 (1967). Obviously, the subject of Section 5923.37, Ohio Revised Code, is "a member of the organized militia"; not the State of Ohio. Even the most strained construction of this section, that still borders legitimacy, could not result in the section constituting Ohio's waiver of its Eleventh Amendment immunity to suit, nor the immunity constitutionalized by Article I, Section 16, Ohio Constitution.

Petitioners conclude:

"... Moreover, to the extent that Ohio seeks to claim sovereign immunity . . . , the application of the doctrine of sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf, the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause, Admr. v. State of Ohio*, *supra* (31 Ohio St.2d 132, 285 N.E.2d 736 (1972))."

This argument has previously been foreclosed by this Court's dismissal of the appeal in *Krause, Admr. v. Ohio*, *supra*, for want of a substantial federal question (34 L.Ed. 2d 506).

IV. *The Allegations of Petitioners' Complaints Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Justiciable Political Questions.*

Petitioners' complaints allege that the respondents ordered improperly trained and inappropriately armed national guard troops onto the Kent State University Campus resulting in the death of Allison Krause and

Jeffrey Miller (Pet. 47-57). Compensatory and punitive damages constitute the requested relief (Pet. 51-52, 56-57). The questions raised herein closely parallel the issue presently before this Court in the case of *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), cert. granted sub nom., *Gilligan v. Morgan*, 34 L.Ed.2d 217 (1972). Although the *Morgan* case concerns a prospective injunctive action involving the future training and weaponry of the Ohio National Guard, the retroactive relief sought herein yields a similar nonjusticiable, political question.⁷

The indicia for determining the presence of a political question are defined by this Court in *Baker v. Carr*, 369 U.S. 186 (1962):

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from

⁷ Respondents respectfully call this Court's attention to the informative Brief for the United States as Amicus Curiae filed by The Honorable Erwin N. Griswold on behalf of the Department of Army in the *Morgan* case.

multifarious pronouncements by various departments on one question." (369 U.S. at 217)

As is indicated in *Baker* (369 U.S. at 217) the presence of any one of these factors justifies dismissal under the political question doctrine. In the instant cases, all of the defined elements are present.

First, there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Article I, Section 8, Clause 16, of the Constitution, places with Congress the power to prescribe weaponry and discipline for the Militia. Congress, acting within this constitutional delegation of authority, has enacted law providing for the training of the Army National Guard, 32 U.S.C. Section 501 (See also, 32 U.S.C. §§502-507). Likewise, Congress has prescribed the arms and equipment issued to the Army National Guard, 32 U.S.C. Section 701. In addition, Congress has authorized the President to prescribe regulations governing the Army National Guard and has given the executive the means to enforce the regulations which he and Congress promulgate, 32 U.S.C. Sections 110, 108, respectively.⁸

Secondly, the judicial branch of government lacks both the physical capabilities and technical skills to deal with the complex military issues raised by petitioners. Traditional rules dictate that the courts are restricted to the evidence presented and arguments of adversaries. Adequate machinery to test, observe, and thereafter evaluate, the alternative training methods and techniques governing civil disturbance control is not available, nor does the judiciary possess the means to experiment with the many,

⁸For a thorough discussion of the Federal Government's historic and pragmatic involvement in the unitary training and arming of the State's national guard components, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

and ever-changing, weapons on the market. Further, the judiciary has neither the time nor the prerogative to conduct the extensive and ongoing investigatory hearings demanded by these complex administrative questions, vital to a sophisticated resolution to the problems. Both the legislature and executive, acting through the Department of Army, do have the necessary physical capabilities to rationally deal with the issues.

Not only is the judiciary physically ill-suited but it is also restricted to a narrow field of legal expertise. Inquiries into and solutions to questions of military tactics are clearly foreign to the judiciary's area of competence. A federal trial court would indeed be hard pressed to fairly instruct a jury on the military issues presented herein. Equally, if not more precarious, would be the plight of twelve laymen when called upon to make technical, factual determinations concerning the appropriateness of the training and weaponry provided to the States' national guard components by the Department of Army.

Thirdly, an isolated judicial precedent relative to these administrative matters would generate a myriad of questions and stymie effective law enforcement. For instance, could the Department of Army modify, and perhaps improve, the judicially endorsed military pronouncements arising from this case without subsequent judicial policy determinations? Would a judicial precedent in this isolated situation control future campus disturbances presenting factual realities not identical to those of May 4, 1970? If the judicial pronouncements and Department of Army regulations were in conflict, which directives would control? Would the judiciary be required to supervise the weekend drills and summer encampments of the national guard to assure the judicial policies were carried out? Who would determine, in the heat of insurrection, whether

future riotous conditions fell within the facts and precedent established by this case?

These questions are raised to demonstrate the quagmire upon which future military commanders, the Department of Army, and the judiciary would be placed if this Court were to hold petitioners' allegations justiciable. In dealing with civil disorder the government must be able to act immediately and confidently lest the delay and doubt insure the success of the insurgency. This vital assurance and split second flexibility demanded by military confrontations are not characteristics of our relatively rigid legal system bound by the ties of narrowly drawn precedent.

A judicial determination herein would indicate disrespect for the legislative and executive branches of government. As heretofore demonstrated, Congress is vested by the Constitution with authority and the responsibility for training and providing weapons to members of the national guard. The President also has been delegated the responsibility of prescribing regulations controlling these matters. A judicial review into the propriety of these administrative decisions would express disrespect and a lack of confidence in these coordinate branches of government to wisely and faithfully fulfill their duties.

Finally, decision by the judiciary would also create the potentiality of multifarious, and even conflicting, pronouncements by the various branches on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. *See, e.g.*, 32 U.S.C. §501, *et seq.*, and 32 U.S.C. §701. Congress may enact new statutes or amend existing statutes in the future. The President has prescribed regulations concerning the training of the national guard; he also may prescribe new regulations on the subject in the

future. If courts attempt to adjudge the training and weaponry of the national guard, there is an eminent possibility that such a mandate would conflict with either existing or future directives from Congress and/or the President.

In the case of *Orloff v. Willoughby*, 345 U.S. 83 (1952), this Court was confronted with similar administrative decisions coming at loggerheads with the asserted rights of a citizen. Therein, this Court concluded:

"... But judges are not given the task of running the Army... The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters... It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of military authorities (345 U.S. at 93-95)."

Both the legislative and executive branches of government have formulated considered directives concerning the training and weaponry provided to the national guard. New and advanced policies and equipment will evolve with the inevitable innovation of military technology. These past and future decisions, promulgated by the coordinate political branches of government, must not be exposed to "disruptive" judicial process.

V. The Federal Government Is an Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard.

The breadth of petitioners' fifth question presented for review (Pet. 4, 25) does not adequately portray the narrow

holding of the lower court. Rather than holding the Federal Government indispensable relative to *all* the claims contained in petitioners' complaints, the lower appellate court concluded that the United States was an indispensable party to the litigation of *those few claims challenging the training and weaponry of the Ohio National Guard* (Sch. App. 17a-19a). Rule 19(a) (2) (i) (ii), Fed.R.Civ.P., defines the relevant criteria upon which the Federal Government is determined a necessary party to the just adjudication of the allegations putting to issue the appropriateness of the training and weaponry provided the Ohio National Guard by the Federal Government.

First, a disposition of these issues would, as a practical matter, impair and impede the ability of the Federal Government to protect the national interests involved therein. Respondents have previously demonstrated the inextricable involvement of the Federal Government in the training and weaponry of the Ohio National Guard (ARGUMENT, IV., pp. 34-39 *supra*). Under the "effect" tests defined by this Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963), it is certain that the Federal Government's interests would be impaired and impeded by the adjudication of these claims. A judicial determination as to the propriety of the Militia's training and weaponry would not only interfere with the public administration of the law providing for the training and weaponry of the Militia [*Land v. Dollar*, 330 U.S. 731, 738 (1947)], but would also restrain the Federal Government from acting and/or compel the Federal Government to act in this critical area vitally affecting national security. [*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949)]

Secondly, and independent of the above, the officers of the Militia would face substantial risk of incurring inconsistent obligations. If a judicial decision differed from the

directives promulgated by the Department of Army, the officers of the Militia, pledged to each, would be placed in jeopardy when deciding to which-master to pay their allegiance. Pursuant to Rule 19(a) (2) (i) (ii), the Federal Government is a necessary party to petitioners' claims that the Ohio National Guard was improperly trained and armed May 4, 1970.

It stands without citation that the Federal Government cannot be made a party to the adjudication of petitioners' claims concerning the training and weaponry provided Ohio's Militia. Rule 19(b), Fed.R.Civ.P., contains practical and pragmatic considerations for determining when claims involving necessary parties should be dismissed—the Rule 19(a) necessary parties thus becoming indispensable. *Shaugnessy v. Pedreiro*, 349 U.S. 48, 54 (1955). The ends to be achieved under these pragmatic standards of Rule 19(b) are those insuring equity and good conscience both to the parties of the lawsuit and those necessary parties not at bar.

Respondents, *under this portion of their ARGUMENT*, are not contending, nor has the lower appellate court held, that petitioners' complaints be dismissed *in toto* under Rule 19(b). Rather, respondents contend that those allegations to which the Federal Government is a necessary party were properly dismissed by the lower court. The equities of Rule 19(b) demand the protection of the Federal Government's interests by dismissing petitioners' allegations concerning the training and weaponry of the Ohio National Guard, leaving petitioners' remaining allegations intact to face respondents' arguments set forth in the earlier sections of this brief.

CONCLUSION

Respondents respectfully submit that the instant case is not an appropriate one for this Court to exercise its jurisdiction. None of the considerations specified in Rule 19 of the Rules of this Court are present. The substance of the Petition for Certiorari is that petitioners disagree with the findings and decisions of the court below. This is not sufficient to justify review on certiorari. See, e.g., *Magnum v. Coty*, 262 U.S. 159, 163 (1923).

There is no federal question of substance which requires resolution. The finding of the courts below, that the complaints failed to state a claim against respondents, is an adequate basis to support the decision. The complaints allege in general and conclusory terms that the governor, the adjutant general, and certain named officers of the Ohio National Guard were guilty of wanton, willful and negligent conduct by ordering the National Guard to duty when they knew there was no cause to do so; and when they knew the troops were not properly trained. In ruling on a motion to dismiss, a court must accept as true all well pleaded factual allegations. However, it need not accept legal conclusions in the form of factual allegations, facts which are not supported or facts which are in conflict with facts judicially known to the court.

The complaints herein do not contain facts which support the contentions that there was no cause to order the troops to duty and the troops were not properly trained. In addition, the executive proclamations attached to the motions to dismiss affirmatively show that there was a need for the National Guard to act in aid of the civil authorities to restore order. The courts below properly refused to accept as true the conclusory allegations of the complaint and properly determined that there were no well pleaded

factual allegations which stated a claim against respondents upon which relief could be granted.

In addition, the determination of the lower courts may be supported on several other grounds. The Eleventh Amendment, United States Constitution and Article I, Section 16 of the Ohio Constitution prohibit the federal courts from assuming subject matter jurisdiction. The allegations of the complaints putting to issue the training and weaponry of the Ohio National Guard involve non-justiciable determinations of a political nature. Finally, those allegations specifically mentioned above, demand dismissal since the Federal Government is an indispensable party to their resolution.

The decision of the courts below is clearly correct. There is no federal question of substance to be determined by this Court.

Respondents therefore respectfully submit that the petition should be denied.

Respectfully submitted,

CHARLES E. BROWN, Counsel of Record
ROBERT F. HOWARTH, JR., Of Counsel
WILLIAM W. JOHNSTON, Of Counsel

DELMAR CHRISTENSEN, Attorney for
Harry D. Jones and John E. Martin

C. D. LAMPROSE, Attorney for
Raymond J. Srp

Attorneys for Respondents

APPENDIX

**AFFIDAVIT OF ADJUTANT GENERAL
SYLVESTER DEL CORSO**

(Filed August 17, 1970)

**ARTHUR KRAUSE, Administrator of
The Estate of ALLISON KRAUSE,**
deceased.

Plaintiff,

vs.

GOVERNOR JAMES RHODES, ET AL.,
Defendants.

Civil Action No. C 70-544

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
AFFIDAVIT**

STATE OF OHIO

COUNTY OF FRANKLIN, SS:

Adjutant General Sylvester Del Corso, being duly
sworn, deposes and says:

* * *

4. At the time plaintiff's alleged cause of action arose,
I was in Columbus, Ohio, and not on the Kent State
Campus.

* * *

/s/ Adjutant General Sylvester Del Corso

**SWORN TO BEFORE ME and subscribed in my presence
this 3rd day of August, 1970.**

/s/ Robert F. Howarth, Jr.

**Notary Public—State of Ohio
Lifetime Commission**

**AFFIDAVIT OF BRIGADIER GENERAL
ROBERT CANTERBURY**

(Filed August 17, 1970)

**ARTHUR KRAUSE, Administrator of
The Estate of ALLISON KRAUSE,
deceased.
Plaintiff,**

vs.

**GOVERNOR JAMES RHODES, ET AL.,
Defendants.**

Civil Action No. C 70-544

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
AFFIDAVIT**

**STATE OF OHIO
COUNTY OF FRANKLIN, SS:**

Brigadier General Robert Canterbury, being duly sworn,
deposes and says:

* * *

4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause.

* * *

/s/ Assistant Adjutant General and
Brigadier General Robert Canterbury

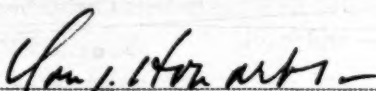
SWORN TO BEFORE ME and subscribed in my presence this 3rd day of August, 1970.

/s/ Robert F. Howarth, Jr.
Notary Public—State of Ohio
Lifetime Commission

AFFIDAVIT OF SERVICE

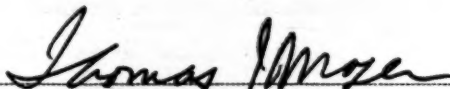
STATE OF OHIO }
 COUNTY OF FRANKLIN } SS

I, ROBERT F. HOWARTH, JR., an attorney in the office of Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp, herein, depose and say that on this 4 day of May, 1973, I served three copies of the foregoing brief in opposition on Steven A. and Joseph M. Sindell, Sindell, Sindell, Bourne, Stern & Spero, 1400 Leader Building, Cleveland, Ohio 44114; and, Joseph Kelner, Kelner, Stelljes, and Glotzer, 217 Broadway, Suite 600, New York, New York 10007, attorneys for petitioners, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to each of the attorneys above at their designated address, being the only parties hereto required to be served.



ROBERT F. HOWARTH, JR.

Subscribed and sworn to before me this 4 day of May, 1973.



WILLIAM H. ALLEN, JR.

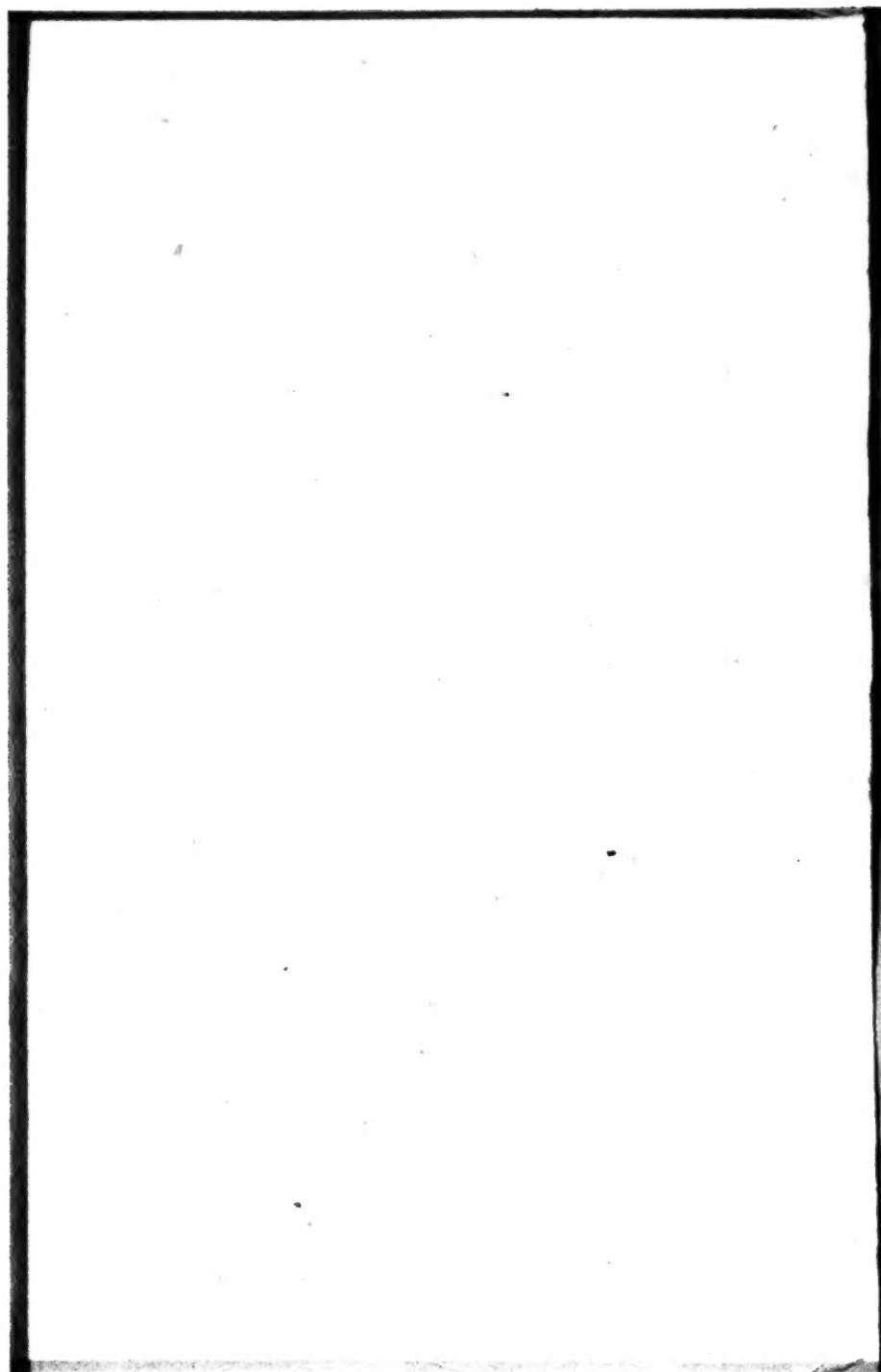
Attorney-At-Law

Notary Public—State of Ohio

My Commission Has No Expiration Date

Section 147.03, O.R.C.

THOMAS J. MOYER, Attorney at Law
 NOTARY PUBLIC — STATE OF OHIO
 LIFETIME COMMISSION



Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1312

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, et al.,
Petitioners,

vs.

JAMES RHODES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

STEVEN A. SINDELL
JOSEPH M. SINDELL
SINDELL, SINDELL, BOURNE, STERN & SPINDO
1400 Leader Building
Cleveland, Ohio 44114
Attorneys for Petitioners,
Elaine B. Miller and Arthur Krause

JOSEPH KILNER
KILNER, STELLIES & GLOTZER
217 Broadway, Suite 600
New York, New York 10007
Attorney for Petitioner, Elaine B. Miller

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED IN THE CASE	3
QUESTIONS PRESENTED	7
STATEMENT OF THE CASE	8
SUMMARY OF ARGUMENT	11
ARGUMENT	17
I. On a Defendant's Motion to Dismiss a Complaint Based Solely Upon the Sufficiency of the Allega- tions of That Complaint, May a Trial or Appellate Court Assume as True Factual Matters Which Are Contrary to the Allegations of That Com- plaint?	17
II. Does the Eleventh Amendment Bar a Damage Action Brought Against the Governor of Ohio, and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities While Acting Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, Which Neither Names the State of Ohio As a Party Defendant, Nor Seeks to Recover Any Damages Payable Through the Treasury of the State of Ohio or Through Any Public Funds?	28
III. Does Any Doctrine of Executive Immunity Bar a Damage Action Against the Governor of Ohio and Against Generals and Officers of the Ohio National Guard Acting in Their Individual Capacities, Individually and in Conspiracy, Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Sec-	

II

tion One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983? -----

57

IV. Where Citizens of Pennsylvania and New York Bring Damage Actions in Federal Court Against the Governor of Ohio and Against Generals and Officers of the Ohio National Guard, These Defendants All Being Citizens of Ohio, for Committing Individually and in Conspiracy the Wanton Killing of Innocent Students on a College Campus, and Where an Ohio Statute (Ohio Revised Code §5923.37) Specifically Provides for Liability Under Such Circumstances, Does a Federal Court Have Jurisdiction Based Upon the Diversity of Citizenship of the Parties? -----

80

V. Is the United States a Necessary Party in a Damage Action Brought Against the Governor of Ohio and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities Alleging That These Defendants, Acting Individually and in Conspiracy Under Color of State Law, Committed Intentional Deprivations of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983? -----

83

CONCLUSION -----

85

III

TABLE OF AUTHORITIES

Cases

<i>Alexander v. Nosser</i> , 438 F.2d 183 (5th Cir. 1971) modified on other grounds 456 F.2d 835 (en banc) ..	44
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)	54, 55
<i>Ayers, In Re</i> , 123 U.S. 443 (1887)	47
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	32
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959)	75, 79
<i>Beauregarde v. Wingard</i> , 230 F. Supp. 167 (S.D. Cal. 1964)	77
<i>Beckwith v. Bean</i> , 98 U.S. 266 (1878)	56
<i>Bivens v. Six Unknown Federal Narcotics Agents</i> , 403 U.S. 388 (1971)	57
<i>Borden's Farm Products Co. v. Baldwin</i> , 293 U.S. 194 (1934)	28
<i>Botto v. Fischesser</i> , 174 Ohio St. 322, 189 N.E.2d 127 (1963)	83
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954) ..	55
<i>Brown v. Spilman</i> , 155 U.S. 665 (1895)	22
<i>Carter v. Carlson</i> , 447 F.2d 358 (D.C. Cir. 1971) cert. granted sub nom. <i>District of Columbia v. Carter</i> , 404 U.S. 1014 (1972)	44
<i>Collins v. Hardyman</i> , 341 U.S. 651 (1951)	17
<i>Dominion Hotel Co. v. Arizona</i> , 249 U.S. 265 (1919) ..	22
<i>Douglas v. California</i> , 372 U.S. 353 (1963)	55
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963)	47, 50
<i>Egan v. City of Aurora</i> , 365 U.S. 514 (1960)	44
<i>Escobedo v. Illinois</i> , 378 U.S. 478 (1964)	54, 55
<i>Fitts v. McGhee</i> , 172 U.S. 516 (1899)	47

IV

<i>Ford Motor Co. v. Department of Treasury of State of Indiana</i> , 323 U.S. 459 (1944)	47, 49
<i>General Oil Co. v. Crane, Inspector of Coal Oil</i> , 209 U.S. 211 (1908)	32, 33
<i>Georgia Railroad and Banking Co. v. Redwine, State Revenue Commissioner</i> , 342 U.S. 299 (1942) ..	47, 51
<i>Gideon v. Wainwright</i> , 372 U. S. 335 (1963)	54, 55
<i>Gossett v. Jackson</i> , 100 Ohio App. 2d 121, 226 N.E.2d 142 (1965)	83
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2nd Cir. 1949)	75, 76, 77, 78, 79
<i>Griffin v. California</i> , 380 U.S. 609 (1965)	55
<i>Griffin v. County School Board of Prince Edward County</i> , 377 U.S. 218 (1964)	32, 33
<i>Griffin v. Illinois</i> , 372 U.S. 353 (1963)	55
<i>Ickes v. Fox</i> , 300 U.S. 82 (1937)	17
<i>Ickes v. Virginia Colorado Development Corp.</i> , 295 U.S. 639 (1935)	17
<i>Jenkins v. Averette</i> , 424 F.2d 1228 (4th Cir. 1970) ..	44
<i>Kellerman v. J. S. Durig Co.</i> , 176 Ohio St. 320 (1964)	83
<i>Kelley v. Dunne</i> , 230 F. Supp. 969 (1964)	78
<i>Krause v. State</i> , 28 Ohio App. 2d 1 (1971)	40
<i>Krause, Admr. v. State of Ohio</i> , 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972)	41, 82
<i>Larson v. Domestic & Foreign Corp.</i> , 337 U.S. 682 (1949)	47, 50
<i>Little v. Barreme</i> , 6 U.S. (2 Cr.) 170 (1804)	56
<i>Luther v. Borden</i> , 48 U.S. (7 How.) 1 (1949)	56
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	54
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) ..	57

<i>McLaughlin v. Tilindis</i> , 398 F.2d 287 (7th Cir. 1971)	44
<i>Milligan, Ex Parte</i> , 71 U.S. (4 Wall. 2) (1866)	69
<i>Minnesota v. Barber</i> , 136 U.S. 313 (1890)	22
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	54, 55
<i>Missouri v. Fiske</i> , 290 U.S. 18 (1933)	47, 49
<i>Mitchell v. Harmony</i> , 54 U.S. (13 How.) 126 (1851)	56
<i>Mitchum v. Foster</i> , 92 S. Ct. 2151 (1972)	35, 75, 77
<i>Monroe v. Pape</i> , 365 U.S. 171 (1961)	36, 44, 75, 77
<i>Moyer v. Peabody</i> , 212 U.S. 78 (1909)	16, 63, 65, 66
<i>Nelson v. Knox</i> , 256 F.2d 312 (6th Cir. 1956)	46
<i>New York, Ex Parte</i> , 256 U.S. 490 (1921)	47, 48
<i>Parden v. Terminal R. of Alabama Dock Dept.</i> , 377 U.S. 184 (1964)	56
<i>Pennoyer v. McConnaughy</i> , 140 U.S. 1	31
<i>Perez v. Ledesma</i> , 401 U.S. 82 (1971)	38, 51, 75
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	15, 69, 71, 72
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	54, 55
<i>Prout v. Starr</i> , 188 U.S. 537 (1903)	32, 33
<i>Reserve Trucking Co. v. Fairchild</i> , 128 Ohio St. 519, 191 N.E. 745 (1934)	83
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963)	27
<i>Roszman v. Sammet</i> , 20 Ohio App. 2d 255, 254 N.E.2d 51 (1969)	83
<i>Sheppard v. Maxwell</i> , 348 U.S. 333 (1966)	27
<i>Sostre v. McGinnis</i> , 442 F.2d 178 (2nd Cir. 1971)	44
<i>S & S Logging Co. v. Barker</i> , 366 F.2d 617 (9th Cir. 1966)	77
<i>Stefanelli v. Minard</i> , 342 U.S. 117 (1951)	46

VI

<i>Sterling v. Constantin</i> , 287 U.S. 378 (1932) -----	
-----	16, 32, 45, 63, 65, 66, 67, 68
<i>Swann v. Charlotte-Mecklenburg Board of Education</i> , 402 U.S. 1 (1971) -----	55
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1971) -----	
-----	15, 69, 71, 73, 74
<i>Universal Concrete Pipe Co. v. Bassett</i> , 130 Ohio St. 567 (1936) -----	82
<i>Virginia, Ex Parte</i> , 100 U.S. 339 (1897) -----	72
<i>Weeks v. United States</i> , 232 U.S. 383 (1914) -----	54
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964) -----	32
<i>White v. Harvey</i> , 170 Ohio St. 262, 163 N.E.2d 898 (1960) -----	83
<i>Wise v. Withers</i> , 7 U.S. (3 Cr.) 330 (1806) -----	56
<i>Young, Ex Parte</i> , 209 U.S. 123 (1908) -----	14, 30, 31, 47, 50
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952) -----	69
<i>Zwickler v. Koota</i> , 389 U.S. 245 (1967) -----	37, 75, 77

Law Review Articles

<i>Engdahl, Immunity and Accountability for Positive Governmental Wrongs</i> , 44 COLORADO L. REV. 1 (1972) -----	56
<i>Engdahl, Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders</i> , 57 IOWA L. REV. 1 (1971) -----	56
<i>Verkuil, Immunity or Responsibility for Unconstitu- tional Conduct: The Aftermath of Jackson State and Kent State</i> , 50 N. CAROLINA L. REV. 549 (1972) -----	56

VII

Constitution

Constitution of the United States:

Article I, Section 6	6, 74
Article I, Section 8	30
Amendment I	6, 42, 74
Amendment XI	3, <i>et passim</i>
Amendment XIV	4, <i>et passim</i>

Statutes and Rules

Civil Rights Act of April 20, 1871, 17 Stat. 13, 42

U.S.C. § 1983	3, <i>et passim</i>
---------------------	---------------------

Federal Rules of Civil Procedure:

Rule 12(b) (1) and 12(b) (6)	10
Rule 12(e)	5, 40

Ohio Revised Code:

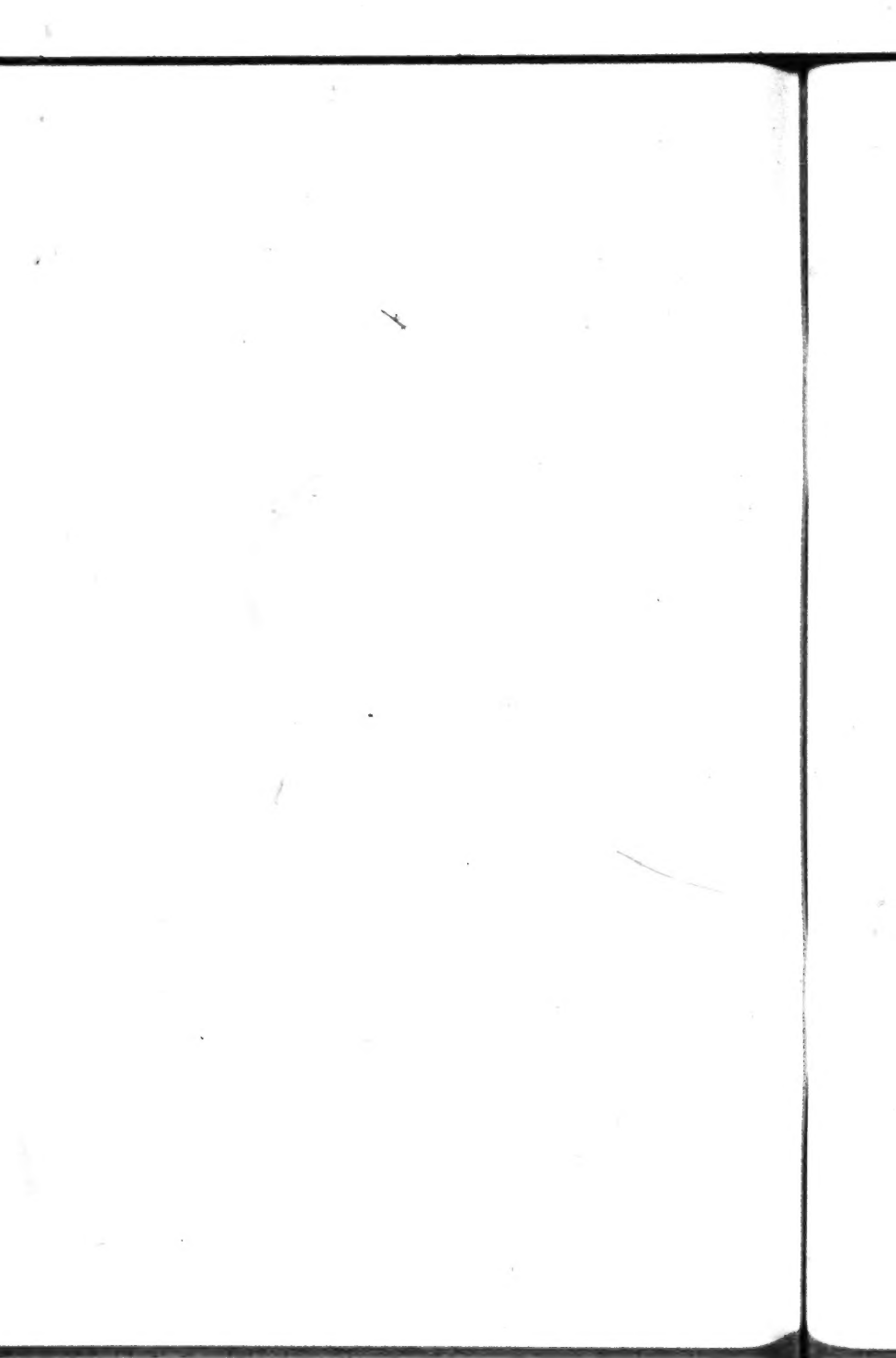
Section 5923.21	5, 62
Section 5923.22	6, 62, 63
Section 5923.37	4, 7, 9, 16, 81, 82

28 U.S.C. § 1254(1)	2
---------------------------	---

28 U.S.C. § 1332	4, 81
------------------------	-------

28 U.S.C. § 1343(3)	3
---------------------------	---

28 U.S.C. § 1343(4)	3
---------------------------	---



Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, *et al.*,
Petitioners,

VS.

JAMES RHODES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is officially reported in 471 F.2d 430 (1972). It is also included in the Appendix of the Petition For Writ Of Certiorari in the case of Sarah Scheuer v. James Rhodes, et al., United States Supreme Court Case No. 72-914, at pp. 1a through 69a therein. Portions of that opinion cited in this brief will be referenced accordingly to the aforementioned Scheuer Appendix. The decision of the United States Sixth Circuit Court of Appeals was

rendered in *Krause v. Rhodes, et al.*, and *Miller v. Rhodes, et al.* (Nos. 71-1622 and 71-1623, 6th Cir.), and were consolidated along with the *Scheuer* case into one opinion by the United States District Court and by the United States Sixth Circuit Court of Appeals. The Memorandum and Order of the United States District Court is unreported; it is included in the Appendix of the Petition For Writ Of Certiorari in this case at pp. 34-36.

It should be noted that for purposes of this review on the merits, this case, Supreme Court Case No. 72-1318 (*Krause and Miller*), has been separated from the *Scheuer* case, Supreme Court Case No. 72-914, and will be treated as a separate appeal.

JURISDICTION

The judgment of the United States Sixth Circuit Court of Appeals was entered on November 17, 1972. On January 3, 1973, the Petition for Rehearing requested by petitioners *Krause and Miller*, which was timely filed, was denied by the United States Sixth Circuit Court of Appeals. (The order denying the Petition for Rehearing is reprinted in the Appendix of the Petition For Certiorari in this case at p. 32). The Petition for Writ of Certiorari was filed within the ninety (90) days after that date. Certiorari was granted by this Court in this case on June 25, 1973. The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . ."

2. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." [Note: This section will hereinafter be referred to as "The Civil Rights Act"]

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. §1343(3) and (4), which provide:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4. **Ohio Revised Code §5923.37** (officially set forth in Baldwin's Ohio Revised Code Annotated, Vol. 7 at p. 21) reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

5. **United States Constitution, Amendment XIV:**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

6. **Title 28, U.S.C. §1332:**

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$10,000.00, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. . ."

7. Federal Rules of Civil Procedure, Rule 12(e):

"Motion For More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

8. Ohio Revised Code §5923.21 (officially set forth in Baldwin's Ohio Revised Code Annotated, Vol. 6 at p. 50), reads as follows:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

9. **Ohio Revised Code §5923.22** (officially set forth in Balwin's Ohio Revised Code Annotated, Vol. 6 at p. 50), reads as follows:

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities. No officer or enlisted man in the organized militia shall refuse to appear at the time and place designated when lawfully directly to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

10. **United States Constitution, Article I, Section 6:**

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

11. **United States Constitution, Amendment I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

QUESTIONS PRESENTED

1. On a defendant's motion to dismiss a complaint based solely upon the sufficiency of the allegations of that complaint, may a trial or appellate court assume as true factual matters which are contrary to the allegations of that complaint?

2. Does the Eleventh Amendment bar a damage action brought against the Governor of Ohio, and against generals and officers of the Ohio National Guard in their individual capacities while acting under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, which neither names the state of Ohio as a party defendant, nor seeks to recover any damages payable through the treasury of the state of Ohio or through any public funds?

3. Does any doctrine of executive immunity bar a damage action against the Governor of Ohio and against generals and officers of the Ohio National Guard acting in their individual capacities, individually and in conspiracy, under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

4. Where citizens of Pennsylvania and New York bring damage actions in federal court against the Governor of Ohio and against generals and officers of the Ohio National Guard, these defendants all being citizens of Ohio, for committing individually and in conspiracy the wanton killing of innocent students on a college campus, and where an Ohio statute (Ohio Revised Code §5923.37) specifically provides for liability under such circumstances, does a federal court have jurisdiction based upon the diversity of citizenship of the parties?

5. Is the United States a necessary party in a damage action brought against the Governor of Ohio and against generals and officers of the Ohio National Guard in their individual capacities alleging that these defendants, acting individually and in conspiracy under color of state law, committed intentional deprivations of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

STATEMENT OF THE CASE

Petitioners filed separate complaints in the United States District Court, for the Northern District of Ohio, Eastern Division. These pleadings are self-explanatory (see Appendix at page 3 for the Amended Complaint in Krause and the Appendix at page 82 for the Complaint in Miller). Named as defendants in the Amended Complaint of Krause were Governor James Rhodes, Sylvester Del Corso and Robert Canterbury. Named as defendants in the Complaint of Elaine Miller were James Rhodes, Sylvester Del Corso, Robert Canterbury, Harry D. Jones, John E. Martin, Raymond J. Srp, Alexander Stevenson and Various Officers and Enlisted Men and Robert White. Defendants in each case filed motions to dismiss. These two cases and a third, the case of Sarah Scheuer v. James Rhodes, et al. (Petition for Writ of Certiorari, United States Supreme Court, Case No. 72-914) were consolidated for the purposes of determination of the motions to dismiss by the District Judge. The United States Sixth Circuit Court of Appeals also treated the three cases together despite differences of counsel and some differences in the causes of action that were raised. After disposition in the Court of Appeals, counsel in the Scheuer case promptly filed for certiorari while counsel for Krause and

Miller instead moved for rehearing by the United States Sixth Circuit Court of Appeals. A request for rehearing *en banc* was made.

The jurisdiction of the District Court was invoked as to the first cause of action alleged by Krause and by Miller because the claim arises under an Act of Congress, Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 and under the equal protection and due process clauses of the United States Constitution. The jurisdiction of the District Court was invoked as to a second cause of action stated in the Amended Complaint of Krause and in the Complaint of Miller on the basis of diversity of citizenship, Krause and Miller being citizens of Pennsylvania and New York, respectively, and all of the defendants being citizens of Ohio.

The complaints allege facts which, if true, would establish claims under Title 42 U.S.C. §1983, and claims for wrongful death under Ohio Revised Code §5923.37, providing that no doctrine of privilege or immunity were established in bar. The Complaints are self-explanatory and their allegations need not be reiterated here in detail. In essence, the complaints allege that the defendants, acting individually and in conspiracy under color of state law, ordered untrained troops with loaded weapons onto the campus of Kent State University on May 4, 1970, and through their intentional actions Allison Krause and Jeffrey Miller were shot and killed. It is alleged that the defendants specifically intended to violate petitioners' constitutional rights and that the shooting of these students was the result of willful, wanton and malicious plans and actions brought about by the individual and conspiratorial conduct of these defendants. It is alleged that the decedents were a part of a peaceful gathering at the time of the shooting. Respondents did not answer the complaints

in either case. Instead they filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The motion to dismiss was granted by the District Court on June 2, 1971, and Krause and Miller (as well as Scheuer) separately appealed to the United States Sixth Circuit Court of Appeals. That court treated the cases together in reaching the judgment now raised for review.

Both the District Court and the United States Sixth Circuit Court of Appeals held that these damage suits against officials, based upon alleged acts in violation of the United States Constitution and to which a state was not a party of record (and against which no monetary recovery was sought) were in substance suits against the State of Ohio itself and thereby barred by the Eleventh Amendment. In addition, the United States Sixth Circuit Court of Appeals held that even if the case could be found as one against individuals, the defendants enjoyed the defense of absolute personal immunity or privilege, equivalent to that enjoyed by judges, which could be invoked to bar any suit such as the one brought by Krause and Miller. While the District Court based its opinion in part on supposed facts contrary to the allegations of the complaints, the United States Sixth Circuit Court of Appeals went even further, elaborating a few of the facts derived from news media, and accusing the lawyers who had drafted the complaints of deliberately attempting to deceive the courts. Neither the District Court nor the majority in the United States Sixth Circuit Court of Appeals gave any consideration to the diversity claims of these petitioners, as distinguished from their claims under U.S.C. Title 42, §1983. In his comprehensive dissent Judge Celebrezze specifically noted each of the errors in the majority opinion of the United States Sixth Circuit Court of Appeals, including the neglect of the diversity claims.

SUMMARY OF ARGUMENT

The Argument will be summarized in accordance with the questions presented, and in the same order as they appear in the Argument itself which follows.

1. It is improper for a trial or an appellate court, in reviewing a motion to dismiss a complaint based upon claimed insufficiency of its allegations, to assume as true factual matters which are contrary to the allegations of the complaint.

The factual circumstances of these cases arise out of the fatal shootings of four students on the campus of Kent State University on May 4, 1970.

The complaints allege that the defendants, Governor James Rhodes, Generals Sylvester Del Corso, and Robert Canterbury and various National Guardsmen, acting under color of state law, both individually and in conspiracy, intentionally, willfully, wantonly, recklessly, callously and maliciously brought about the fatal shooting of Jeffrey Miller and Allison Krause, two students present at a peaceful gathering on the campus. The complaints allege that these actions were taken with the specific intent to violate petitioners' constitutional rights. The complaints allege further that the troops with loaded weapons were sent to the campus by the Governor and the Generals with the knowledge that there was no cause for sending them and that their presence created an imminent risk of injury and death to the students. Although not specifically alleged, it is a fact that the shootings took place in the midst of a heated political campaign in which the Governor, running on a so-called "law and order" platform, was a major contender in the Republican Senatorial Primary several days away. Many of the students were protesting the extension of the IndoChina conflict into Cambodia,

which had recently been made public. The Governor took command of the troops, going personally to Kent where, the day before the shootings, he publicly made intemperate urgings to the troops and generals. Defendant Canterbury was standing amongst the troops that did the actual firing on May 4, 1970. Both Generals Del Corso and Canterbury liberally invoked their constitutional privilege against self-incrimination in response to interrogatories propounded to them, and which are part of the record in this case. (Appendix, pages 67-80) Captain Srp, another defendant, who was an officer sharing responsibility for the conduct of Troop G which did the firing, also invoked the constitutional privilege against self-incrimination in reference to any occurrence on the day of May 4, 1970, the day of the shooting. His deposition is part of the record in this action.

In the face of these allegations, both the lower court and the circuit court concluded that there was a riot and insurrection, and Judge O'Sullivan specifically accused counsel of "contriving to hide rather than disclose the true background of the event." (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 31a.) Judge O'Sullivan took "judicial notice" of what he described as events "widely and publicly known across the nation" (Scheuer Appendix, page 30a) and asserted that the circumstances were "all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal." (Scheuer Appendix, page 38.) The district court asserted that the Governor had acted "in good faith." (Appendix, page 93.)

Not only are the factual assumptions of the lower courts contrary to the allegations in the complaints, they are also contrary to the Justice Department Summary of the FBI Investigation and the conclusion of the President's

Commission on Campus Unrest that the shootings were "unnecessary, unwarranted, and inexcusable." Not even the Governor himself claimed in his Proclamation of May 5, 1970 (the day after the shooting) that there was a "riot" or "insurrection" at Kent State University.

Petitioners contend that it was highly improper for the lower court to allow news media accounts to influence their review of the sufficiency of the complaints, thereby disregarding their allegations. This was an abuse of the rule of judicial notice, since the factual issues raised by the allegations of the complaints could not be summarily determined without presentation of evidence.

II. The Eleventh Amendment does not bar these actions.

Congress, in enacting the Civil Rights Act, intended to enforce the provisions of the Fourteenth Amendment which prohibit a state from depriving a citizen of due process of law and equal protection of the laws. The Eleventh Amendment is, in theory, qualified by the Fourteenth Amendment in the sense that claims against a state seeking redress for violations of due process and equal protection are not barred by sovereign immunity. To hold otherwise would remove judicial redress against a state whose agents violated a citizen's Fourteenth Amendment rights. While the Eleventh Amendment, in federal actions, extends sovereign immunity to the state with respect to other kinds of claims, it cannot extend sovereign immunity in federal court to states where deprivations of Fourteenth Amendment rights are claimed. The purpose of the Fourteenth Amendment was to limit and prohibit state action in matters of due process and equal protection. This limitation would be nullified if the Eleventh Amendment extended immunity to the states where deprivations of Fourteenth Amendment rights were claimed.

However, Congress has never exercised its full power to enact legislation enforcing the Fourteenth Amendment by allowing citizens to sue the states directly. But the Civil Rights Act does provide for damage suits against individuals who violate citizens' constitutional rights "under color" of state law. The present suits are against these defendants as individuals. They seek damages from them individually, and not from the state treasury. Any judgment rendered in these actions would in no way require any specific action or inaction on the part of any official or agent of the State of Ohio. Nevertheless, the circuit court asserts that the Eleventh Amendment bars these actions because they "directly and vitally affect the rights and interests of the state." If this standard were applied to actions brought under Section 1983, then almost all claims would be barred thereunder, because any claim against a state official can certainly be said in some sense to "directly and vitally affect the rights and interests of the state." The circuit court has proposed a radical departure from the established manner of determining which actions are against the state, and which actions are not. The prior decisions of this Court manifestly hold that claims against a state official for deprivation of federal constitutional rights are not barred by the Eleventh Amendment. The leading authority in this regard is *Ex Parte Young*, 209 U.S. 123 (1908). It is important to note that the intent of the Civil Rights Act was to deter unconstitutional misconduct, thereby bringing about a desirable effect upon state officials to protect the constitutional rights of citizens.

The fact that the instant actions are for damages as opposed to injunctive or declaratory relief is mandated by the circumstance of the deaths involved, and has no bear-

ing on the Eleventh Amendment's application one way or the other. The Civil Rights Act specifically provides for broad relief, including both legal and equitable relief.

III. None of these defendants are entitled to claim executive immunity as a bar to these suits.

If the Governor or the generals can claim executive immunity in these actions, then judicial review of the use of military troops against civilians will be removed. This places the Governor and the generals above the law; it gives them an unbridled license to commit unconstitutional acts—including the unconstitutional taking of life—with complete impunity. This is a dangerous proposition in a democracy, and a virulent threat to the rights of the citizenry. Immunity from suits brought under Section 1983 has been extended to judges (*Pierson v. Ray*, 386 U.S. 547 (1967)), and to legislators (*Tenney v. Brandhove*, 341 U.S. 367 (1971)), but never to the executive. It should not be extended to the executive, because to do so would emasculate all redress intended by Congress in enacting the Civil Rights Act. Moreover, the legislative and judicial immunities were premised upon strong common law traditions which existed prior to the enactment of Section 1983. No such tradition existed with respect to executive immunity. Also, an unconstitutional judicial decision can be corrected on appeal. A legislative action generally involves deliberation, and permits an aggrieved party the opportunity to persuade others of the legitimacy of his own viewpoint. Moreover, legislative activity inherently involves the exercise of First Amendment rights, which are entitled to particular protection. Finally, whatever official action a legislator takes does not carry with it the same irrevocable impact of a military action ordered and committed by executive officials.

Where a governor has acted unconstitutionally in the use of military troops—that is, in bad faith as alleged in these cases—his actions are subject to judicial review and redress, as against any claims of sovereign or executive immunity. In this regard, *Moyer v. Peabody*, 212 U.S. 78 (1909), and *Sterling v. Constantin*, 287 U.S. 378 (1932), are the leading authorities which support petitioners' contentions.

IV. *The diversity claims state valid causes of action under Ohio Revised Code § 5923.37.*

Ohio Revised Code § 5923.37 reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

A reading of the complaints reveals that the allegations state a cause of action under this Ohio statute. Neither the district court nor the circuit court discussed these claims. It was error to have dismissed them.

V. *The United States is not a necessary party to this suit.*

All of the actions alleged in the complaint were done by state officials. The mere fact that the United States, in some sense, was involved in the training of these troops does not make the United States a necessary party.

ARGUMENT

I. ON A DEFENDANT'S MOTION TO DISMISS A COMPLAINT BASED SOLELY UPON THE SUFFICIENCY OF THE ALLEGATIONS OF THAT COMPLAINT, MAY A TRIAL OR APPELLATE COURT ASSUME AS TRUE FACTUAL MATTERS WHICH ARE CONTRARY TO THE ALLEGATIONS OF THAT COMPLAINT?

In reaching its decision, the lower court on a motion to dismiss refused to accept as true the allegations of the complaints, as required upon such a motion. *Collins v. Hardyman*, 341 U.S. 651 (1951); *Ickes v. Virginia Colorado Development Corp.*, 295 U.S. 639 (1935); *Ickes v. Fox*, 300 U.S. 82 (1937). Instead, both the district court and the circuit court circumvented the allegations in the complaints by substituting their own factual assumptions, and then determined that the complaints as thus "amended" by the judges in finding facts contrary to the allegations, failed to state a cause of action. Thus, under this unprecedented procedure, both the district court and the circuit court actually failed to rule on the question of whether the pleadings filed by the petitioners stated a cause of action. Instead, the lower courts ruled on the question of whether the pleadings, as factually altered by the various judges, according to their notions of the occurrence based upon the newspaper accounts, stated a cause of action. The lower courts then found that *their* complaints (as opposed to the *petitioners'* complaints) did not state a cause of action.

This erroneous departure from the normal rules of procedure in and of itself justifies reversal in these cases.

Petitioners find it necessary to allude to some of the facts "found" by the lower courts without the benefit of properly presented evidence.

For example, the district court in its opinion (Opinion of the District Court, Appendix, page 93) specifically "found" the following:

"The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this Court cannot substitute its position for that of the Executive of the State of Ohio." (Emphasis added.)

Petitioners cannot understand how the district court knew that the Governor of Ohio "had determined in good faith that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University"? There is absolutely nothing in the allegations of the complaints which would suggest that the Governor acted "in good faith" or that there was "riot and mob rule" at Kent State University at the time of the shooting. Quite to the contrary, the complaints specifically allege a specific intent on the part of the Governor to deprive the deceased students of their constitutional rights, and that the national guard under the command of defendant Canterbury, intentionally, willfully, wantonly and maliciously fired live ammunition at a peaceful gathering. Nevertheless, the district court continued to make frequent references to "riot and mob rule" to "quelling riot", to "an unrestrained mob" and to the use of the militia "in time of tumult" (Opinion of the District Court, Appendix, page 93). Having thus "found" without evidence presented that the Governor acted "in good faith", the district court then held that the complaints failed to state a claim for relief. It is obvious that whatever complaints were being construed or reviewed by the district court, they were not the complaints filed by the petitioners.

Unfortunately, the majority opinions in the circuit

court are similarly infected with factual conclusions drawn from various newspaper or other unknown accounts of the incident, since the majority judges in the circuit court had no more evidence before them than the district court judge. Nevertheless, Judge Weick writing for the majority makes the following facile references:

1. **"The Governor of Ohio called out the Ohio National Guard to suppress a riot in the city of Kent, Ohio, and on the campus of Kent State University."** (Emphasis added.) (First sentence of the Opinion of Judge Weick, Scheuer Appendix, page 3a.)

2. **" . . . These suits . . . were against the State of Ohio since they directly and vitally affected the rights and interest of the state in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public."** (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 4a.)

3. **"It would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court, in a multitude of protracted actions, because he called out troops to suppress riots or disorders which resulted in injury."** (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, pages 11-12a.)

4. **"It would surely take a hardy executive to exercise his discretion by calling out troops to suppress a riot or insurrection, if he knew that in so doing the wisdom of his action could later be challenged in the courts."** (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 12a.)

5. **"We ought not to limit the Governor in the exercise of his discretion to call out the National Guard to suppress a riot or insurrection; neither should we tell the military not to carry loaded weapons to protect the troops when someone may shoot or throw rocks at them."** (Emphasis added.) (Opinion

of Judge Weick, Scheuer Appendix, page 16a.)

6. "Not one Ohio case is cited in the dissent wherein the Governor, the officers or members of the Guard, have been held liable in a civil action for acts performed in the suppression of insurrection." (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 22a.)

7. ". . . nor should we make their actions in this respect in times of emergency, subject to judicial review." (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 22a.)

Judge O'Sullivan in his concurring opinion, carries his "factual findings" to even greater lengths. Some examples are as follows:

1. "The pleadings in the case before us, except by extravagant conclusional allegations and some dissembling, strive to avoid threshold dismissal. (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 28a.)

2. "Thus the pleaders would leave it that the Guard had no reason for being at Kent; that the Governor of Ohio with his soldiers entered upon the peace and quiet of Kent State campus as invaders, bent on killing innocent girls and boys . . . This writer does not hesitate to label such pleadings obvious contrivances to get into court without pretense of fair averment of causes of action." (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 28a.)

3. "The complaints, with transparent purpose, omit any mention of what had taken place in the City of Kent and on the campus of Kent State University." (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 28a.)

4. "I believe also that what had been going on at Kent State and its environs preceding the tragic deaths of these young people is so widely and pub-

licly known across the nation that this court may take judicial notice of such events. 8 Cyc. Fed. Proc. § 26.226 (3rd ed. 1968)" (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 30a.)

5. "The pleadings make no mention of the burning down of the ROTC Building on the campus of the University and the continued threats to persons and property—all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal." (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 30a.)

6. "The pleadings presented to the District Judge were clearly contrived to hide rather than disclose the true background of the involved events—an attempt to predicate causes of action without disclosing their true subject matter." (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 31a.)

Petitioners query how Judge O'Sullivan determined, without the benefit of evidence, the existence of a "state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal?" How did Judge Weick determine, without the benefit of evidence, that there was a "riot" or "insurrection?" How could Judge O'Sullivan state that the pleadings "were clearly contrived to hide rather than to disclose the true background of the involved events?" How did Judge Weick reach the conclusion that the military may have required loaded weapons for protection "when someone may shoot or throw rocks at them"? How is it legally permissible for Judge O'Sullivan to take judicial notice of such events on the premise that they are "so widely and publicly known across this nation"? This is an outright abuse of the rule of judicial notice. Judicial notice was never

designed as a vehicle through which a magistrate reviewing the sufficiency of a complaint could substitute personal views gleaned from the news media for the rules of law and evidence comprising the most basic notions of due process. *Dominion Hotel Co. v. Arizona*, 249 U.S. 265 (1919); *Brown v. Spilman*, 155 U.S. 665 (1895); *Minnesota v. Barber*, 136 U.S. 313 (1890).

Again, the observation of Judge Celebrezze is painfully correct (Opinion of Judge Celebrezze, Scheuer Appendix, page 33a):

"The majority opinion is nonetheless framed under the assumption that the violence and riotous conditions which, according to the media, may have prevailed on the Kent State Campus, have been established as proven facts for purposes of the present suits."

For a reviewing court to indulge in news media accounts as a substitute for evidence is altogether unjustified. The most passing glance at a diverse sampling of news media headlines instantly reveals the utter unreliability of such an approach to finding "facts" from the media.¹

A still more revealing account is found in the con-

¹"GUARDSMEN WERE TIRED AND HARASSED, SAYS COLONEL" (Cleveland Press - May 5, 1970); "TROOPS LOST ALL THEIR COOL" (Cleveland Plain Dealer - May 5, 1970); "BULLETS UNSELECTIVE IN CLAIMING 4 LIVES" (Cleveland Plain Dealer - May 5, 1970); "SNIPER CLUE SIFTED AT KSU" (Cleveland Plain Dealer - May 6, 1970); "PENTAGON TRAINING RULES FROWN ON MASS GUNFIRE" (Cleveland Plain Dealer - May 6, 1970); "13 SECONDS TURNED SPRING AT KENT STATE INTO BLOODY ARENA OF DEATH, CHAOS" (Cleveland Plain Dealer - May 17, 1970); "TROOPS AT KENT AGREED TO SHOOT, REPORT CONTENTS" (Cleveland Plain Dealer - July 23, 1970 - New York Times Service); "FBI-NO REASON FOR GUARD TO SHOOT AT KENT STATE" (Akron Beacon Journal - July 23, 1970); "NIX-ON PANEL DUE AT KSU AUG. 19" (Cleveland Plain Dealer -

clusions drawn by the United States Department of Justice in its summary of the exhaustive FBI investigation, parts of which have been presented in the *New York Times*, (November, 1970), and in the Senate Congressional Record ("FBI Reports Guardsmen Committed Murder", Senate Congressional Record, July 31, 1970, pages 26707-8; "Murder at Kent State University", Senate Congressional Record, October 13, 1970, pages 36370-1; "S 4336 - Introduction of A Bill To Compensate the Survivors of the Kent State University Tragedy", Senate Congressional Record, September 14, 1970, page 31517; "Attorney General Mitchell and Justice Department Officials Deserve Credit for Thorough Impartial Investigation of Kent State Tragedy—Federal Grand Jury Investigation in Cleveland Next in Order", Senate Congressional Record, August 4, 1970, pages 27213-4; "Murder on Kent State University Campus", Senate Congressional Record, August 10, 1970, pages 27873-5). The entire summary is

(Continued from previous page)

July 28, 1970); "2 IN GUARD 'WON'T TESTIFY'" (Cleveland Plain Dealer - August 20, 1970); "RHODES SHUNS HEARING AT KSU" (Cleveland Plain Dealer - August 20, 1970); "KENT LAWYER DENIES 'SHOOT ALL' REMARK" (Cleveland Plain Dealer - October 26, 1970); "CHURCH GROUP ON KENT: IT WAS MURDER" (Miami Herald - July 22, 1971); "STUDY SAYS GUARDSMEN PLOTTED TO SHOOT KENT STATE STUDENTS" (Washington Post - July 23, 1971); "CONGRESSMEN DEMANDING NEW KENT STATE INQUIRY" (New York Times - July 25, 1971); "WHEN IS IT APPROPRIATE FOR KENT STATE JUSTICE?" (Dayton Daily News - July 25, 1971); "CONSPIRACY CHARGED IN KENT KILLINGS" (Pittsburgh Forum - July 30, 1971); "JUSTICE QUIBBLES OVER KENT STATE" (Washington Post - August 23, 1971); "CHURCHES ASK U.S. - KSU PROBE" (Akron Beacon Journal - November 16, 1971); "KENT INDICTMENTS . . . THE SCALES OF JUSTICE ARE UNBALANCED" (Dayton Journal Herald - November 17, 1971); "MURDER AT KENT STATE" (Playboy Magazine - December, 1971); "KENT STATE: TOTAL BREAKDOWN IN OUR SYSTEM OF JUSTICE" (Horizon - December 3, 1971).

set forth in 119 Congressional Record, page E207-213, Daily Edition, January 15, 1973.

A number of these conclusions are set forth as follows:

1. "Just prior to the time the Guard left its position on the practice field, members of Troop G (107th Armoured Cavalry) were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .

The Guard was then ordered to regroup and move back up the hill past Taylor Hall."

2. "The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistance. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded."

3. "Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation."

4. "We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions."

5. "[One guardsman] admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."

6. "Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons."
7. "No verbal warning was given to the students immediately prior to the time the Guardsmen fired."
8. "There was no request by any Guardsmen that teargas be used."
9. "There was no request from any Guardsmen for permission to fire his weapon."
10. "The Guardsmen were not surrounded."
11. "No Guardsman claims he was hit with rocks immediately prior to the firing."
12. "There was no sniper."
13. "The FBI has conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon."
14. "At the time of the shooting, the National Guard clearly did not believe that they were being fired upon."
15. "Each person who admits firing into the crowd has some degree of experience in riot control. None are novices."
16. "A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds."
17. "Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student."
18. "Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

19. "Four students were killed, nine others were wounded, three seriously. Of the students who were killed, Jeff Miller's body was found 85-90 yards from the Guard. Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot."

20. "Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day."

21. No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away, another, 75 yards; another 95 or 100 yards; another 110 yards; another 125 or 130 yards; another 160 yards; and the other, 245 or 250 yards.

22. "Seven students were shot from the side and four were shot from the rear."

23. "Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC Building on Saturday, May 2, 1970."

24. "As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and Wrentmore were merely spectators to the confrontation."

In addition to the FBI investigation, the events at Kent State University on May 4, 1970, were extensively investigated by the President's Commission on Campus Unrest, appointed by President Nixon on June 13, 1970. The Commission, in its report, found that the shootings

were "unnecessary, unwarranted, and inexcusable." Former United States Attorney General John Mitchell publicly stated his agreement with this factual conclusion of the President's Commission on Campus Unrest, more commonly known as the Scranton Commission, after its Chairman, former Governor William Scranton of Pennsylvania. Interestingly, the record in this case reflects the liberal invocation of the Fifth Amendment's privilege against self-incrimination by defendants Del Corso and Canterbury, which goes to emphasize the need for further discovery. (See Answers to Interrogatories, Appendix, pages 67-80.)

Petitioners are not presenting this material as necessarily positive or admissible proof of the truth of their allegations. This material is presented for the sole purpose of demonstrating the inappropriateness of the actions of the lower courts in refusing to accept as true the allegations of the complaint in reviewing their sufficiency on a motion to dismiss. The taking of judicial notice of the news media accounts, particularly by Judge O'Sullivan, was wholly unjustified, as has been already demonstrated. Where a *prima facie* case is alleged, a court reviewing a complaint may not disregard its allegations by substituting versions of events which are supposedly "widely and publicly known across the nation." Obviously, the various news media accounts presented herein by petitioners are just as "widely and publicly known across the nation", rendering both useless and dangerous any attempt at judicial notice of facts contrary to the allegations in the complaints.

Indeed, this Court has condemned the undue saturation of biased news media exposure in a community where a defendant is faced with a criminal charge. *Sheppard v. Maxwell*, 348 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963). If juries must decide issues of fact

solely upon admissible evidence, the courts too must shun the influence of the media in determining the legal sufficiency of complaints. Perhaps the best judicial observation in this regard was made by Justices Cardozo and Stone in their concurring opinion in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934):

"We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." 293 U.S. 194, 213.

II. DOES THE ELEVENTH AMENDMENT BAR A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO, AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES WHILE ACTING UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983, WHICH NEITHER NAMES THE STATE OF OHIO AS A PARTY DEFENDANT, NOR SEEKS TO RECOVER ANY DAMAGES PAYABLE THROUGH THE TREASURY OF THE STATE OF OHIO OR THROUGH ANY PUBLIC FUNDS?

The United States Sixth Circuit Court of Appeals affirmed the dismissal of these actions on the pleadings as follows (Opinion of Judge Weick, Scheuer Appendix, p. 4a):

"The theory of the motions to dismiss was that these suits, although nominally against the Chief Executive and officers of the State, in substance and effect were against the State of Ohio since they directly and vitally affected the rights and interests of the state in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public." (Emphasis added.)

However, as Judge Celebrezze observed in his dissent (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 32a):

"Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. §1983, with its requirement that defendants thereunder be shown to have acted under color of state law."

Petitioners contend that both the district court and the circuit court have unjustifiably overextended the bounds of the Eleventh Amendment in holding that these suits must be dismissed because they are "in substance and effect against the State of Ohio since they directly and vitally affected the rights and interests of the state. . ." (Emphasis added).

Petitioners suggest that no such judicial test has ever been applied by this Court in determining the propriety of any action brought under the conspiracy or personal liability sections of the Civil Rights Act, for to do so would virtually cripple the remedy that statute was intended to provide.

The Fourteenth Amendment by its plain terms, limits the power of the state. It mandates that *no state* shall deprive any person of due process of law or equal protection of the laws. The Eleventh Amendment provides that *no state* shall be suable in a federal court. Thus, while on the one hand the Eleventh Amendment would appear to bar an action against the state in a federal court, the Fourteenth Amendment would appear to provide for an action against a state, at least to the extent that a state violates a citizen's rights to due process of law and to equal protection of the laws.

Moreover, the Fourteenth Amendment contains, in Section 5 thereof, a specific enforcement section: "The

Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

This power of Congress to legislate and *enforce* the provisions of the Fourteenth Amendment to prevent a state from depriving a citizen of due process of law or equal protection of the laws is buttressed by the Necessary and Proper Clause of Article I, Section 8 of the Constitution.

Thus, in theory, Congress has the power to enact legislation providing for redress directly against a state in instances where a state violates a citizen's right to due process of law and to equal protection of the laws. This is so because it must be assumed that Congress understood the existence and meaning of the Eleventh Amendment when, over 50 years later, it enacted the Fourteenth Amendment. The enactment of the Fourteenth Amendment should be viewed, by implication, as a qualification of the earlier Eleventh Amendment inasmuch as the Fourteenth Amendment was, by its terms, specifically designed to limit state power and to authorize appropriate legislation to enforce those limitations on state power insofar as the federal rights of due process and equal protection were involved.

This court discussed the relationship between the Eleventh Amendment and the Fourteenth Amendment in *Ex Parte Young*, 209 U.S. 123 (1908). In that case, a suit in equity was brought by stockholders of a railroad against the Attorney General of Minnesota seeking to enjoin the Attorney General from enforcing state legislation which the stockholders contended was violative of due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment—this by virtue of the rates and penalties contained in the state legislation. The Minnesota Attorney General claimed that the action

was barred by the Eleventh Amendment because it was "in truth and effect a suit against the State of Minnesota." 209 U.S. 123, 132. Thus, he claimed that the federal court, which had enjoined the enforcement of the legislation, did not have jurisdiction to hold him in contempt for disregarding the injunction by enforcing the legislation in the Minnesota State Courts.

This Court, in holding that the action was not a suit against the State of Minnesota in violation of the Fourteenth Amendment specifically noted therein in citing language in the prior decision of *Pennoyer v. McConaughy*, 140 U.S. 1, 9:

"But the general doctrine of *Osborn v. Bank of the United States*, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from." 209 U.S. 123, 152.

This Court in *Ex Parte Young*, *supra*, was not required to reach the issue of whether an action directly against a state to redress state deprivations of Fourteenth Amendment rights was barred by the Eleventh Amendment, since this Court found the action against the Minnesota Attorney General to be against him individually and not against him in his official capacity. Thus, it was not an action against the state. As this Court stated in *Ex Parte Young*, *supra*:

"If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official

or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States . . . If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts." 209 U.S. 123, 159.

The question of whether Congress has the power to enforce the prohibitions applicable to the states expressed in the Fourteenth Amendment by enacting appropriate legislation for redress in federal court directly against a state has never been squarely resolved by this Court.

However, this Court has held expressly and by implication in several decisions that in suits against state officials, wherein it is claimed that those state officials violated the Fourteenth Amendment rights of citizens, the Eleventh Amendment will not bar such a suit. *Sterling v. Constantin*, 287 U.S. 378 (1932); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Prout v. Starr*, 188 U.S. 537 (1903); *General Oil Co. v. Crane, Inspector of Coal Oil*, 209 U.S. 211 (1908).

Thus, in *Sterling v. Constantin*, *supra*, this Court specifically rejected the Eleventh Amendment immunity claim of Governor Sterling of Colorado and General Wolters of the Colorado Militia:

"The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons

injured may have appropriate relief." 287 U.S. 378, 393.

More recently, in *Griffin v. County School Board of Prince Edward County*, *supra*, the same principle was applied to a suit brought on behalf of negro school children against the county school board and against state and county officials which alleged racial discrimination:

"It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." 377 U.S. 218, 228.

In *Prout v. Starr*, *supra*, this Court specifically addressed itself to the relationship between the Eleventh and Fourteenth Amendments:

"Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments." 188 U.S. 537, 543.

Similarly, in *General Oil Co. v. Crane, Inspector of Coal Oil*, *supra*, this Court held:

"It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily

to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which if directed at state action could be nullified as to much of its operation. And it will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the possibility of extremes. There need not, however, be imagination of extremes, if by extremes be meant a deliberate purpose to prevent the assertion of constitutional rights. Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as in a kind of outlawry. See *Ex parte Young*, ante, p. 123, where this subject is fully discussed and the cases reviewed." 209 U.S. 211, 226-227.

However, if this Court should conclude—as petitioners contend it should not—that the instant action is for any reason directly against the State of Ohio, then petitioners urge that nonetheless the Eleventh Amendment does not bar *this particular action* because *this particular action* seeks redress under the provisions of the Fourteenth Amendment which cannot be abrogated or rendered meaningless by the prior Eleventh Amendment, which has been qualified by Fourteenth Amendment.

In any event, no such problem of conflict between the Eleventh and Fourteenth Amendments is raised by

these actions. Congress apparently did not enact a law providing for redress for violations of due process of law and equal protection of the laws directly against a state, although it could have. Rather, the Civil Rights Act stopped short of this by providing for an action for redress at law or in equity against every person acting "under color" of any state law who violates a citizen's federal constitutional rights. Congress clearly had the authority to enact this legislation. The several historical analyses made by various justices of this Court of the Congressional intent surrounding its enactment all reveal the circumstances which, in 1871, compelled Congress to enact the legislation.

In *Mitchum v. Foster*, 92 S. Ct. 2151 (1972), Justice Stewart pertinently analyzed the Congressional intent in the enactment of the Civil Rights Act:

"As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492; *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed.2d 622; *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; *Zwickler v. Koota*, 389 U.S. 241, 245-249, 88 S. Ct. 391, 383-396, 19 L. Ed.2d 444; Flack, *The Adoption of the Fourteenth Amendment* (1908); tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment* (1951). Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." 92 S. Ct. 2151, 2160.

* * * * *

"Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in

an attempt to remedy the state courts' failure to secure federal rights." 92 S. Ct. 2151, 2161.

* * * * *

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state officers might, in fact, be anti-pathetic to the vindication of those rights; and it believed that these failings extended to the state courts." 92 S. Ct. 2151, 2162.

* * * * *

"Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676." (Emphasis added.) 92 S. Ct. 2151, 2162.

In *Monroe v. Pape*, 365 U.S. 171 (1961), Justice Douglas, writing for this Court, asserted:

"The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. 171, 179.

* * * * *

"Opponents of the Act, however, did not fail to note that by virtue of §1 federal courts would sit in judg-

ment on the misdeeds of state officers. Proponents of the Act, on the other hand, were aware of the extension of federal power contemplated by every section of the Act." 365 U.S. 171, 182.

In *Zwickler v. Koota*, 389 U.S. 245 (1967), Justice Brennan discussed the historical intent of Congress in enacting the Civil Rights Act as follows:

"During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. The only exception was the 25th section of the Judiciary Act of 1789, 1 Stat. 85, providing for review in this Court when a claim of federal rights was denied by a state court.

But that policy was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." 389 U.S. at 245.

* * * * *

"Indeed, even before the 1875 Act, Congress, in the Civil Rights Act of 1871, subjected to suit, '[e]very person who, under color of any statute * * * subjects, or causes to be subjected, any citizen of the United States or other person * * * to the deprivation of any rights * * * secured by the Constitution and laws * * *', 42 U.S.C. §1983; and gave the district courts 'original jurisdiction' of actions '[t]o redress the deprivation, under color of any State law * * * of any right * * * secured by the Constitution * * *.' 28 U.S.C. §1343 (3).

In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." 389 U.S. 245, 247.

Having thus examined the background of the Civil Rights Act and the light and circumstances of its Congressional enactment in 1871, it is similarly pertinent to review the historical background of the Eleventh Amendment as it relates to actions brought under the Civil Rights Act. A recent discussion by this Court along these lines is found in the opinion (concurring in part and dissenting in part) of Justice Brennan, joined by Justices White and Marshall, in *Perez v. Ledesma*, 401 U.S. 82 (1971):

"*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between *Osborn* and *Young*, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights. This history was reviewed in *Zwicker v. Koota*, 389 U.S., at 245-249, 88 S. Ct., at 393-394, 396, 19 L. Ed.2d 444. The principal foundations of the expanded federal jurisdiction in constitutional cases were the Civil Rights Act of 1871, 17 Stat. 13, which in §1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state statute, ordinance, regulation, custom, or usage, see 42 U.S.C. §1983, 28 U.S.C. §1343 (3), and the Judiciary Act of 1875, 18 Stat. 470, which gave lower federal courts general federal-question jurisdiction, see 28 U.S.C. §1331. These two statutes, together, after 1908, with the decision of *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court." 401 U.S. 82, 106.

The effect of the unprecedented holding of the circuit court was aptly described by Judge Celebrezze in dissent

(Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 39a):

"To hold that the present suits against state officials under Section 1983 are barred by the Eleventh Amendment would in effect overrule the Supreme Court's holding in *Ex Parte Young* and destroy Section 1983 as a tool by which federal courts are to guard against state interference with constitutional rights."

Let there be no mistake about it. Part of the motivation of the majority in the circuit court was an apparent personal distaste for the Civil Rights Act itself. This becomes apparent in reviewing the language of Judge O'Sullivan who wrote in the opening portion of his concurring opinion as follows (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, p. 27a):

"In this case, we deal again with the ever-widening employment of Section 1983 for a purpose 'not plainly apparent from its language,' as such language was employed by the Congress when it adopted the Section in 1871 to combat some of the wrongs of our post-Civil War society. Currently, however, many courts have provided Section 1983 with new uses and much popularity—crowding today's courts with such volume of claimed causes of action as to seriously impair the judiciary's ability to meet its total burden of protecting American society."

If the decision below is permitted to stand, then this Court will have affirmed what Judge Celebrezze termed "the destruction of Section 1983 as a tool against which federal courts are to guard against state interference with constitutional rights."

Judge Celebrezze is correct in his analysis of the failure of the majority judges below "to recognize the status of these suits and the precedential effects of their ill-ad-

vised pronouncements." (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 33a.)

These suits were dismissed on the pleadings without any evidence being taken. They are not suits against the state itself. They do not seek any injunctive relief. These suits do not seek to require or to prohibit any action by the State of Ohio or by any of its officials now or in the future. A damage judgment for petitioners, if rendered in these lawsuits, would in no way require any payment from the state treasury, or any action or inaction by any state official. Indeed, many of the defendants, including the governor and the commanding generals, are no longer officials of the State of Ohio. The petitioners seek only damages, not to be satisfied from the treasury of the State of Ohio, but from the individuals themselves. Within the permissible rules of general, notice pleading—compelled to some extent by a lack of discovery at the time of pleading—the petitioners allege that the defendants, both in conspiracy and individually, committed willful and wanton actions specifically intending to violate the petitioners' constitutional rights which led to and brought about as intended, the malicious shooting and killing of innocent students on a college campus without any justification whatsoever. At no time did the defendants request by motion a more definite or certain statement on the pleadings, as was available to them under the Federal Rules of Civil Procedure, Rule 12(e).

The State of Ohio has immunized itself from suits for redress in its own courts arising out of this same tragic incident. Mr. Krause attempted to persuade the Ohio courts that its doctrine of sovereign immunity was contrary to the Federal Constitution. Notwithstanding a favorable ruling to that effect by the Cuyahoga County Court of Appeals, *Krause v. State*, 28 Ohio App.2d 1 (1971),

the Ohio Supreme Court reversed, *Krause v. State*, 31 Ohio St.2d 132 (1972), reinstating the antiquated sovereign immunity doctrine on both state and federal grounds. This Court refused to hear the appeal on its merits (34 L. Ed.2d 506), and also denied a Petition for Re-Hearing (35 L. Ed.2d 208 (1972)).

There is a limited redress under Ohio Revised Code §5923.27, which states:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

However, such a limited right in no way provides the kind of redress contemplated and made available by Congress in the Civil Rights Act. In effect, then, the only meaningful legal remedy left is the present suit under 42 U.S.C. §1983. If this remedy is removed, there will be no redress of any kind available to petitioners, notwithstanding the clear terms of the Fourteenth Amendment which command that "no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The respondents and the lower courts contend that the Eleventh Amendment bars these actions, not because the state is a party defendant, not because the state treasury may be forced to pay a judgment, not because the state or any of its officials will be required by any judgment rendered in these suits to do or not to do any act, not because the complaints fail in substance to allege violations of due process of law or equal protection of the

laws, but because these suits "directly and vitally affected the rights and interests of the state" and are thus "in substance and effect" against the state.

The phrase utilized by the lower courts—"directly and vitally affected the rights and interests of the state"—strikingly dramatizes a radical departure from the present law. For if the question of whether a suit under the Civil Rights Act is barred by the Eleventh Amendment is to be determined by whether the suit "directly and vitally affects the rights and interests of the state", then the entire basis of the Civil Rights Act is subverted. Who can ever say when and how in any given case the rights and interests of the state are "directly and vitally affected"? And wherein lies the authority for the brazen implication that, in any event, the "directly and vitally affected rights and interests of the state" are automatically accorded preferential consideration to the "directly and vitally affected rights and interests of the individual"? Here we speak of the right of individuals to life, and to be free of maiming injury, including in the case of one student paraplegia resulting from being shot in the spine. This is to say nothing of First Amendment rights to assemble peacefully on a college campus, to protest the War in Cambodia, or the right to walk between a dormitory and a classroom without being interrupted by a fatal national guard bullet through the head. It is respectfully submitted by petitioners that the lower courts overindulged at the pleading stage in the "rights and interests of the state," claimed to exist in the Eleventh Amendment, to the disastrous neglect and indifference to the "rights and interests of the individual" as expressed in the Fourteenth Amendment, the Civil Rights Act, and numerous decisions of this Court.

In reality, there is no tenable way of determining when and under what circumstances the interests of the

state are "directly and vitally affected". Respondents claim, along with the lower courts, that petitioners' actions "directly and vitally affect" the State of Ohio because, in the words of Judge Weick, "we ought not to deter the Chief Executives of either the state or the nation in the *unflinching* performance of their duty to protect the public nor should we make their actions in this respect in times of emergency subject to judicial review." (Emphasis, the Court's.) (Opinion of Judge Weick, Scheuer Appendix, p. 22a.) This, indeed, constitutes advocacy of a revolutionary doctrine totally alien to our traditional constitutional protection accorded to individual citizens. The doctrine thus enunciated by Judge Weick would unleash and legalize autocratic, uncontrolled powers of would-be dictators or tyrants. How distinguishable are such unrestrained powers from the alien philosophies of foreign despots who executed their citizens under the banner of "protecting the public?" Here, then, is the crux, the very heart of this appeal. Should excesses of the executive power be exempt from judicial review upon the bare allegation that their commission is in times of "emergency"? We think not in America.

It can be readily seen that this same reasoning could be applied to bar any action under Section 1983, not just one against the governor, commanding generals and national guardsmen. This is so because there is no civil rights action which does not in some sense "directly and vitally affect the state"—or does not deter some state official from "the unflinching performance of his duties". Indeed, a more logical argument is that 42 U.S.C. §1983 was intended by Congress to "directly and vitally affect" the state, and to deter state officials, insofar as the performance of their duties infringed the constitutional rights of citizens.

A review of the cases illustrates the danger. Could it not easily be said in *Monroe v. Pape*, *supra*, that individual police officers would be deterred by that action from the "unflinching performance of their duties"? Did the suit against city commissioners, counsel for the city, the sheriff, the police chief, the state's attorney and others in *Egan v. City of Aurora*, 365 U.S. 514 (1960) "vitally affect" the municipality and the state? Was the state "directly and vitally affected" in *McLaughlin v. Tilindis*, 398 F.2d 287 (7th Cir. 1971) when the superintendent of schools and elected members of the school board were sued in a damage suit under the Civil Rights Act? What "vital effect" occurred to the state in *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971), when suit was brought for damages against state administrative officials under the Civil Rights Act? Can the same question not be raised as to the "vital effect" on the state in *Alexander v. Nossner*, 438 F.2d 183 (5th Cir. 1971) *modified on other grounds* 456 F.2d 835 (en banc), when actions under Section 1983 were brought against the police chief, the fire chief, and the prison warden? In *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971) *cert. granted sub nom. District of Columbia v. Carter*, 404 U.S. 1014 (1972), to what extent were the police captain and police chief deterred from the "unflinching performance of their duties" by that action brought against them under Section 1983? And in the damage action brought against the police officer in *Jenkins v. Averette*, 424 F. 2d 1228 (4th Cir. 1970), were the rights and interests of the state "directly and vitally affected" in that action?

It can be readily seen from a cursory examination of the decisions under the Civil Rights Act that the radical proposition of the lower courts, injecting the bar of the Eleventh Amendment on the basis of the presumed ef-

fect of a lawsuit against the state, wholly undermines and unravels the entire purpose and effect of 42 U.S.C. §1983. This Court should feel obligated, as it has in the past, to render meaningful and effective the purpose and intent of an Act of Congress adopted pursuant to the express provisions of the Fourteenth Amendment. The wording of Section 1983 is broad and expansive and does not admit of any exceptions when it states that liability should attach to "EVERY person," making no special exceptions for governors, generals or national guardsmen. And certainly neither the Fourteenth Amendment nor the Civil Rights Act make any exceptions for actions which "directly and vitally affect" the state. In these times of unrest and dissension it may seem stringent to allow judicial review in damage suits of the actions of state officials. But the wisdom, let alone the law, regarding such judicial review should be apparent. To allow a chief executive or his commanding generals to be beyond judicial review, in effect, places such officials above the law, providing for them a kind of executive immunity which Congress never intended, and which the law does not permit. How often it is said that the duty of this Court is not so much to re-examine the wisdom of a Congressional enactment, but rather to interpret it and to effectuate its meaning.

Moreover, the fact that these are actions seeking damages as opposed to equitable relief hardly merits any difference in treatment. An injunction has no meaning as a remedy to these petitioners after a death (or injury) has already occurred. As this Court noted in *Sterling v. Constantin*, *supra*:

"The argument of appellants intimates, while it reserves the question, that it may be possible for the courts to call upon the Governor, after the alleged emergency has passed, to account for what he has done, but that they may not entertain a proceeding

for injunction. *The suggestion confuses the question of judicial power with that of judicial remedy.*" (Emphasis added) 287 U.S. 378, 403.

Similarly, in *Stefanelli v. Minard*, 342 U.S. 117 (1951), this Court held:

"And under the very section now invoked, [§1983], we have withheld in equity even when recognizing that comparable facts would create a cause of action for damages. Compare *Giles v. Harris*, 189 U.S. 475, 23 S. Ct. 639, 47 L. Ed. 909 with *Lane v. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281." 342 U.S. 117, 122.

The Court's attention is additionally directed to the decision of the United States Sixth Circuit Court of Appeals in *Nelson v. Knox*, 256 F.2d 312, 314-15 (6th Cir. 1956).

The Civil Rights Act itself places damages on an equal footing with other remedies insofar as it provides for "an action at law, suit in equity, or other proper proceeding for redress." The language of the statute suggests a congressional intent to open the broadest possible avenues for redress.

A long line of decisions of this Court amply demonstrates the basic interpretation of the Eleventh Amendment in light of constitutional claims which have been developed and adhered to for a century. The teaching of those decisions is essentially that where the satisfaction of a judgment would be from the treasury of the state, then the action is against the state and is thus barred by the Eleventh Amendment; or, in the case of equitable relief, where the action itself would require or prohibit a specific act by the state, then the action is similarly determined to be against the state and thus barred by the Eleventh Amendment. *However, where the action is against the state officer in his individual or "ministerial"*

capacity for an alleged violation of federal constitutional rights, then the action is not considered to be one against the state; rather, it is viewed as an action against the individual, not barred by the Eleventh Amendment. In *Re Ayers*, 123 U.S. 443 (1887); *Fitts v. McGhee*, 172 U.S. 516 (1899); *Ex Parte Young*, 209 U.S. 123 (1908); *Ex Parte New York*, 256 U.S. 490 (1921); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1944); *Larson v. Domestic & Foreign Corp.* 337 U.S. 682 (1949); *Georgia Railroad and Banking Co. v. Redwine*, State Revenue Commissioner, 342 U.S. 299 (1952); *Dugan v. Rank*, 372 U.S. 609 (1963).

A review of the aforementioned authorities quickly reveals the long-standing rule of law regarding the Eleventh Amendment. In *In Re Ayers*, *supra*, a lawsuit was brought against state officers and agents having no personal interest in the subject matter, who were sued in their representative capacities, wherein the requested relief was for a decree ordering acts constituting the specific performance of an alleged contract of the state. Clearly, this suit by its direct operation and effect would have potentially required specific actions by state officials as a result of any judgment rendered. Notwithstanding the Eleventh Amendment bar to this suit, this Court specifically stated:

"The Court does not intend to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs." 123 U.S. 443, 444.

In *Fitts v. McGhee*, *supra*, suit was brought to restrain the criminal prosecution by a state on the claim that the criminal statute did not set forth reasonable com-

pensation tolls for the use of a particular bridge. Although this Court held such suit to be barred by the Eleventh Amendment (again an action which would directly operate to specifically prohibit and/or require actions by state officials), this Court specifically noted as follows:

"If their officers commit acts of trespass and wrong to the citizen, they may be individually proceeded against for such trespasses or wrongs." 172 U.S. 516, 525.

This Court further noted as follows:

"[The Eleventh Amendment] must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are *guilty of personal trespasses and wrongs*, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." (Emphasis added.) 172 U.S. 516, 525.

In *Ex Parte New York, supra*, the action involved damage suits brought against the Superintendent of Public Works of the State of New York. The suit sought damages directly from the state treasury. In holding that this action was barred by the Eleventh Amendment this Court specifically noted as follows:

"There is no suggestion that the Superintendent was

or is acting under color of an unconstitutional law, or otherwise than in the due course of the constitution and laws of the State of New York." 256 U.S. 490, 501-2.

In *Missouri v. Fiske*, *supra*, the action therein sought an injunction against the State of Missouri to prohibit it from prosecuting probate court proceedings in a Missouri State court. It was a suit by a relative of a decedent to determine and quiet a remainder interest and to obtain an accounting. Again, it can be seen that the relief sought was such as to directly prohibit state officials from performing a specific act, namely, prosecuting a lawsuit in its own court. Similarly, in barring this action on the basis of the Eleventh Amendment this Court specifically held as follows:

"The ancillary and supplemental bill is brought by the respondents directly against the state of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment. That principle is that the exemption of states from suit does not protect their officers from personal liability to those whose rights they have wrongfully invaded." 290 U.S. 18, 20-21.

In *Ford Motor Co. v. Department of Treasury of State of Indiana*, *supra*, suit was brought to recover from the state treasury gross income tax which had been paid by the taxpayers. This taxpayers' suit was barred by the Eleventh Amendment, as it can obviously be seen that the action sought recovery directly from the treasury of the State of Indiana. Again, as in all of the previous decisions, this Court noted as follows:

"But, they [the defendants, namely, the governor, treasurer and auditor of the state] were joined as the collective representatives of the state, not as in-

dividuals against whom personal judgment is sought." 323 U.S. 459, 463-464.

In *Dugan v. Rank*, *supra*, an action was brought by riparian and overlying owners to enjoin officers of the United States Bureau of Reclamation from impounding water in a federal dam in the San Joaquin River—allegedly in contravention of claimed rights to the beneficial use of those waters of the river below the dam. In holding that the action was barred as against the United States, this Court followed its prior precedents in noting that any decree granted in the case would have required the expenditure of public funds by the United States, as well as requiring the doing of a specific act by the United States, namely to dispose of irrigation water. However, as in previous decisions, this Court in *Dugan* specifically referred with approval to the language in the prior decision of *Larson v. Domestic & Foreign Corp.*, *supra*, as follows (at p. 701 of *Larson*):

"The action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are 'constitutionally void.'" (Emphasis added.) 372 U.S. 609, 622.

By striking contrast, this Court has similarly held that where the lawsuit challenges an allegedly *unconstitutional* state action or state statute, Eleventh Amendment immunity does not apply. Thus, the action of the Minnesota Attorney General in attempting to enforce an allegedly unconstitutional state statute was the principal subject of suit in federal court for equitable relief, and not barred by the Eleventh Amendment. *Ex Parte Young*,

supra; similarly in *Georgia Railroad and Banking Co. v. Redwine, State Revenue Commissioner, supra*, wherein a citizen challenged the constitutionality of collecting taxes that allegedly impaired the obligation of contract, this Court refused immunity under the Eleventh Amendment in holding that "a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state." 342 U.S. 299, 304.

As Justice Brennan wrote in his separate opinion in *Perez v. Ledesma, supra*, as recently as 1971, "Ex Parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." 401 U.S. 82, 106.

There can be little doubt that the present action falls demonstrably within that category of decisions which are not barred by the Eleventh Amendment. The present action does not seek a money judgment to be satisfied by the state treasury, nor does it seek to require or prohibit any act by the state. The suit, to the contrary, is against individual state officials for alleged violations of petitioners federal constitutional rights. The manifest weight of authority of this Court holds that such an action is not barred by the Eleventh Amendment. By the same token, there is no authority for the proposition advanced by the lower courts that the act must be barred by the Eleventh Amendment because "the rights and interests of the state are directly and vitally affected." Petitioners emphasize that the present interpretation by this Court of the scope of the Eleventh Amendment provides a workable standard easily applicable in all cases. For example, it is far less difficult in damage actions to determine whether satisfaction is ultimately to be sought from the state treasury or from the individual, than to determine whether the

"rights and interests of the state are directly and vitally affected." Moreover, the present authorities are consistent with the purposes of the Eleventh Amendment, in light of its history, whereas the approach of the lower courts would distort that purpose and more seriously, create a conflict with the purposes of the Fourteenth Amendment.

There is no good reason for this Court to depart from its long established interpretation of the Eleventh Amendment, while on the other hand there is considerable basis for continuing to adhere to the traditional interpretation. To depart from the present interpretation of the Eleventh Amendment's scope, as is suggested in this case by the lower courts and by respondents, would emasculate the guarantees of the Fourteenth Amendment. Clearly, the Fourteenth Amendment and the Civil Rights Act were designed by Congress to interpose the federal courts between the state and the citizen. To reject judicial review and thereby judicial remedy is to remove the protection of the federal courts provided by Congress for the benefit of citizens injured by the unconstitutional excesses of state officials. The approach to Eleventh Amendment immunity proposed by the lower courts really amounts to an expansion of that amendment far beyond its historical purpose or practical justification. This expansion, if permitted by this Court, will constitute an intrusion of the Eleventh Amendment into the sphere of protection created by the Fourteenth Amendment (and by the Civil Rights Act).

What it boils down to is simply this: these petitioners are unable to seek redress against the State of Ohio in state court, the State of Ohio having immunized itself from such suits. Moreover, under present interpretations of the Eleventh Amendment, it would appear to be un-

realistic for these same petitioners to seek any relief directly against the State of Ohio in federal court. Thus, these actions against the governor, the generals and the guardsmen are the only available form of relief left to these petitioners for alleged violations of their constitutional rights. It has always been a fundamental precept of the law and of this Court that for every wrong there shall be a remedy. Nothing is more rudimentary in the concept of due process of law. How much more pressing is the need when the alleged wrong is a violation of the Federal Constitution under the most shocking kinds of circumstances.

It is meaningless to talk about the guaranteed rights to freedom of expression, association and assembly, and to life and liberty themselves in the abstract as being part of due process of law guaranteed in the Fourteenth Amendment, unless these fundamental rights can be effectively realized and exercised, and their violation effectively redressed. If state officials, acting under color of state law, can individually and in conspiracy, illegally, wantonly, intentionally, maliciously, and unconstitutionally shoot and kill a student on a college campus without any justification whatsoever, and thereafter be entitled to claim immunity from any redress in a federal court for the wrong allegedly committed, then the guarantees of due process and equal protection in the Fourteenth Amendment are meaningless and inoperative statements which exist only on a piece of paper. By depriving the victim of a remedy, the victim is deprived of the right itself.

This Court has time and time again reached decisions designed to insure the realization of a guaranteed constitutional right by judicially protecting its exercise, and fashioning a remedy where the right has been violated.

For example, over fifty years ago this Court decided in *Weeks v. United States*, 232 U.S. 383 (1914), that the exclusionary rule should apply to federal prosecutions. This Court there said at 232 U.S. 383, 393:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

The logic of this rule became apparent where in *Mapp v. Ohio*, 367 U.S. 643 (1961), this same reasoning was applied to the states. Over ten years ago, in *Mapp*, *supra*, this Court explained its meaning, the spirit of which applies to this present case:

"To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." 367 U.S. 643, 656.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963) (now extended to apply to misdemeanors in the recent decision of *Argersinger v. Hamlin*, 407 U.S. 25 (1972)), this Court recognized that it was meaningless to hold forth a constitutional right to counsel, when that right was unavailable to the indigent accused. Earlier, in *Powell v. Alabama*, 287 U.S. 45 (1932), this Court held that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (287 U.S. 45, 68-9). Eventually, the right to counsel was further protected in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), where this Court then felt that the right to counsel, in order to be meaningful, included the right to be informed of the right to counsel. What did all of the

procedural rights in a court trial mean, when the trial had already been held in the police station, so, in effect, this Court reasoned.

In *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), this Court held that the right to an appeal included the right to an effective appeal, whereby the state was required to pay the costs of reproducing the record and transcript on appeal of an indigent defendant.

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that the privilege against self-incrimination would be almost meaningless if its assertion was burdened with the penalty of free comment by the prosecution.

In the many decisions following *Brown v. Board of Education*, 347 U.S. 483 (1954), including the recent decision of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court has sought to make meaningful the essence of equal protection of the laws so that it is not mere theory on paper, but rather reality in practice. In *Swann, supra*, this Court spoke in terms to which the spirit of this appeal is addressed, at 402 U.S. 1, 15-16:

"However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."

All of these decisions—*Gideon*, *Argersinger*, *Powell*, *Escobedo*, *Miranda*, *Griffin v. Illinois*, *Douglas*, *Griffin v. California*, *Brown*, *Swann, supra*, and *Marbury, infra*,—evidence a clear intent on the part of this court to effectuate and protect fundamental constitutional rights, just as petitioners argue in this case that a damage remedy

against the state officials is the only way to effectuate the assertion of their fundamental constitutional right.

It is striking that such considerable protection is afforded the rights of the lowliest accused, even a drunk driver, and yet your petitioners herein, Arthur Krause and Elaine Miller, must yet convince this Court to afford civil redress to protect not the accused, but the victims. Surely the innocent victims of this society, the Allison Krauses, the Jeffrey Millers, and their parents are entitled to the same consideration in the prosecution and protection of their civil rights as the defendant accused of committing a misdemeanor. This is plainly a matter of fundamental constitutional justice. See Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N. CAROLINA L. REV. 549 (1972); and Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971).

Historically, in the area of military violence, the need for redress—even in the face of immunity—has been urged by this Court. *Beckwith v. Bean*, 98 U.S. 266 (1878); *Mitchell v. Harmony*, 54 U.S. (13 How.) 126 (1851); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1949); *Wise v. Withers*, 7 U.S. (3 Cr.) 330 (1806); *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); Cf. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 COLORADO L. REV. 1 (1972).

More recent expressions of this Court buttress petitioners' contention that there is a constitutional right to a remedy. In *Parden v. Terminal R. of Alabama Dock Dept.*, 377 U.S. 184 (1964), a particularly noteworthy indication of this Court was expressed:

"[W]e should not presume to say in the absence of express provision to the contrary, that it [F.E.L.A.]

intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a single 'sovereign immunity exception' into the Act would result, moreover, in a right without a remedy." (Emphasis added.) 377 U.S. 184, 190.

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the importance of redress is manifest in the value judgment and decision of this Court. There, this Court cited the pertinent language in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), (at p. 163), as follows:

"The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for a violation of a vested legal right."

For all of these foregoing reasons, this Court should reject any argument that the Eleventh Amendment in any way bars the present actions brought by these petitioners.

III. DOES ANY DOCTRINE OF EXECUTIVE IMMUNITY BAR A DAMAGE ACTION AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD ACTING IN THEIR INDIVIDUAL CAPACITIES, INDIVIDUALLY AND IN CONSPIRACY, UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. § 1983?

In addition to the claim that these petitioners are barred from bringing these actions by virtue of the Eleventh Amendment, respondents (along with the lower courts) also contend that they have the privilege of avoiding judicial review and redress by virtue of the doctrine of executive immunity. The question of executive im-

munity is raised, in the first instance, by Governor Rhodes.

Examining the claim of Governor Rhodes that he is entitled to assert the privilege of executive immunity, it becomes quickly apparent that the extension of executive immunity would place the Governor above the law. The essence of the argument is that the Governor should not be subject to judicial review in connection with orders given and measures taken as commander-in-chief of the military forces of the state. This executive immunity, as it is claimed by the respondents, would immunize the governor and others from suits, even in cases where the actions of the Governor are in bad faith and with the specific intent to violate a citizen's federal constitutional rights. The logic in support of executive immunity is set forth by Judge Weick in his opinion for the circuit court (Opinion of Judge Weick, Scheuer Appendix, page 12a):

"To place a straight jacket on the state's Chief Executive in times of emergency so that he could not freely exercise his discretion, would indeed stop the state government 'in its tracks'."

Petitioners suggest that this Court should conclude that a greater danger to the state and its integrity is created by the removal of all judicial check on the conduct of the Governor and his generals in sending out military forces. If the Governor or others are beyond the pale of judicial review, particularly in such a serious matter as the sending, ordering, and controlling of military troops in civilian situations, then those officials are provided a judicial license to engage in whatever activities they choose whether wise or unwise, honest or malicious, constitutional or unconstitutional, with complete impunity. The life of a citizen, as in these cases, can be unconstitutionally taken, and there is no judicial redress whatsoever. A student, as in this case, can be paralyzed from the waist

down for the rest of his life by unconstitutional actions, and the courthouse doors are completely closed to him.

The present fact situation surrounding the incident of May 4, 1970 cannot be seen without reference to the political climate which existed at the time. Governor Rhodes was several days away from the date of the Republican Senatorial Primary in which he was one of the two leading contenders. The issues in that primary campaign involved persistent cries for "law and order", while at the same time the federal government was engaged in the extension of the IndoChina conflict into Cambodia, which then met with massive opposition and protest in student bodies throughout the country. Governor Rhodes had particularly advanced himself to the Republican electorate as the strong advocate of the so-called "law and order" position. It is not the intention of petitioners in this brief to discuss the merits or demerits of the Governor's "Law and Order" position, or the merits or demerits of the attitudes which prevailed amongst the student body. These are matters of political choice which any citizen is free to make. Petitioners urge upon this court that the atmosphere and climate of May 4, 1970, was rife with political passion. The Governor, on the night prior to the shooting, held a public press conference in which extreme and intemperate statements were made by him on the scene of Kent, Ohio in the presence and knowledge of the generals and troops. The Governor was personally present in command of these troops, working them up to a passionate frenzy in order, as petitioners contend, to achieve his personal political goals. Petitioners have alleged in substance, that the actions of this Governor, including the various orders he gave personally at the scene and elsewhere, individually and in conspiracy with others, directly resulted in the deaths of four innocent

students. Petitioners state unabashedly that the Governor was dishonest in his motives and unconstitutional in his actions. The Civil Rights Act was designed to reach this extreme kind of unconstitutional violation. Nothing could be more essential to the individual in the protection of his constitutional rights than his right to life—particularly where the use of military forces is involved. This court cannot resolve the issues regarding executive immunity, which are premised upon policy considerations, without reference to the factual context in which this tragedy occurred. **CERTAINLY, PETITIONERS OUGHT TO HAVE AT LEAST A RIGHT TO PRESENT EVIDENCE TO A TRIAL COURT OF THE FACTUAL CONTEXT.**

Moreover, as Judge Celebrezze specifically noted in his opinion (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, page 44a):

"Another compelling reason for not applying a doctrine of executive immunity in suits under Section 1983 lies in the simple fact that such a doctrine, if added to the legislative and judicial immunity presently recognized under the statute, would totally circumscribe the remedy provided in Section 1983."

Reference must be made to the specific facts which are part of the record in this case. There were two Proclamations allegedly issued by the Governor, one on April 29, 1970, and the other on May 5, 1970 (the day after the Kent State shooting). (Appendix, pages 29-34.) The April 29th Proclamation makes no specific reference to Portage County where Kent State University is situated. It refers particularly to seven counties in Ohio, covering vast geographical areas of the state and populations in the millions. The Proclamation of April 29, 1970, refers to the existence of "unlawful assemblies and roving bodies of men acting with intent to commit felony and to do

violence to person or property in disregard of the laws of the State of Ohio and the United States of America." (Appendix, page 29.) These so-called "unlawful assemblies" and "roving bodies of men" refer to "wildcat strikes in the truck transportation industry", as indicated in the subsequent Proclamation of May 5, 1970. (Appendix, page 32.) It is true that by the Governor's Proclamation of May 5, 1970, mention is made of "disorders or threatened disorders on campuses of Ohio State University in Franklin County and campuses of other state assisted universities", referring to the earlier Proclamation. (Appendix, page 32.) There is no indication, however, that the earlier Proclamation of April 29, 1970, had anything to do specifically with any disorder at Kent State University.

Thus, the relevant Proclamation is the Proclamation of May 5, 1970, issued by the Governor one day after the shootings had taken place. The Proclamation of May 5, 1970 refers to what the Governor characterizes as prior "verbal orders" made to the Adjutant General of Ohio. (Appendix, page 32.) The Proclamation is obviously a self-serving attempt to justify the Governor's prior conduct, where the Governor states in the Proclamation itself that, "it is desirable to make a written record, both events and the derivation of authority exercised by personnel and units of the Ohio National Guard in Portage County and Franklin County." (Appendix, page 33.) The Governor makes few references to the nature or extent of the necessity for calling out troops on the Kent State campus on May 4, 1970. He refers to "disorders," "threatened disorders", maintaining "peace and order," "to protect life and property throughout the State of Ohio," "the restoration of order" and time of "public danger". (Appendix, pages 32-33.) It is noteworthy that at no point in any of his proclamations does the Gov-

ernor suggest that there was "riot" or "insurrection." A reading of the Proclamations does not indicate that the Governor had determined that there was a "riot" or "insurrection." Ohio Revised Code § 5923.21 reads as follows:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia." (Emphasis added.)

Ohio Revised Code § 5923.22 reads as follows:

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities."

"No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws of the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case." (Emphasis added.)

Nowhere in the entire set of Proclamations issued by the Governor is there any mention of the words "riot", "insurrection", "invasion", "tumult", or "mob". More importantly, the reference to campuses, which presumably includes Kent State University, refers only to "disorders", "threatened disorders", "peace and order", and "public danger". It would therefore appear that the Governor, by his own terms, was not reacting to a situation contemplated by Ohio Revised Code § 5923.21 or by Ohio Re-

vised Code § 5923.22. Certainly, the complaints set forth allegations quite to the contrary with regard to May 4, 1970. Moreover, in light of the decisions of *Moyer v. Peabody*, 212 U.S. 78 (1909) and *Sterling v. Constantin*, 287 U.S. 378 (1932), it is significant that the Proclamations of the Governor, even after the fact of the shooting, do not set forth conditions of riot or insurrection.

Moreover, and more importantly, these Proclamations only represent the claimed thinking of the Governor at the time they were issued. They certainly do not establish as fact the substance of their contents. Petitioners contest the truth of the contents of the Proclamation of May 5, 1970, and particularly, the Governor's claim concerning "verbal orders" at a prior time. Moreover, petitioners contend that the Proclamations do not include all of the orders given by the Governor. These are appropriate subjects for judicial inquiry and are clearly questions of fact for a court to resolve. As we stated in *Sterling v. Constantin*, *supra*:

"What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case are judicial questions . . . there is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. 378, 401.

In summary, then, it can be seen that the Governor himself, by his own terms, was never reacting to an "insurrection" or "riot", the existence of which was erroneously assumed by the lower courts. If there is any ambiguity or omission in the Governor's own Proclamations, surely that ambiguity must be resolved, on a motion to dismiss, in favor of the opposing party, namely the petitioners herein. Among other things, petitioners ought to be entitled to test the foundation, omissions and ambi-

guities in the Governor's Proclamations in discovery procedures.

It may be claimed by respondents that the Governor was responding to what amounted to riot or insurrection at times prior to May 4, 1970. The Concurring Opinion of Judge O'Sullivan places great weight on these claimed circumstances. It should be noted that the record of this case contains no such specific references with regard to the campus of Kent State University. It is true that the ROTC Building was burned down. It has not been clearly established by whom, nor what the specific causes of that were. The same can be said for the disturbances in the City of Kent, Ohio. The FBI noted that none of the students wounded or killed were found to be involved in any of the prior disturbances at Kent. (Justice Department Summary of FBI Investigation, Part I of this brief, at page 26, item number 23). Moreover, the Governor made personal appearances on the campus, taking over as commander in chief on the scene. He was conferring regularly with his generals and troops, and apparently giving orders at that time. All of this took place in the contest of a heated political campaign in which the Governor was an active candidate. Thus, the factual circumstances of this case go far beyond the broad generalities asserted in the Governor's Proclamations. He was not a dispassionate observer sitting behind his desk confronted with a riot, insurrection, or invasion. He was a highly charged political candidate running on a "law and order" platform, personally exerting his presence and authority as commander in chief over troops with loaded weapons on a college campus. If the allegations in the complaints of petitioners are true, then the Governor of Ohio conspired and otherwise acted individually to violate the petitioners' constitutional rights, with the specific intent to

do so. He is chargeable in this case with the knowledge he had and the orders he gave, including the fact that on May 4, 1970, there was absolutely nothing occurring on the campus of Kent State University which justified even the presence of massive units of troops with loaded weapons, let alone the incredible actions they allegedly took there. Petitioners are entitled to a judicial review of the Governor's conduct under these circumstances. This case was dismissed on the pleadings, with little or no real opportunity for discovery. Petitioners have a right to maintain the Governor as a defendant under these circumstances. There is a difference between judicial restraint and judicial abdication. To allow executive immunity to the Governor or the generals in these cases would amount to the latter.

With respect to the Governor, the two leading cases would appear to be *Sterling v. Constantin* and *Moyer v. Peabody*, *supra*. A review of these two decisions of this Court will quickly reveal the inapplicability of any notion of executive immunity in petitioners' cases.

Moyer, supra, involved a claim (by the alleged leader of an outbreak) that he had been unreasonably imprisoned for two and one half months by state troopers, directed to imprison him by the Governor of Colorado. The claim was made under the Civil Rights Act. The facts assumed by this Court in *Moyer* are critical to an understanding of its holding. As stated in the opinion of this Court:

"The facts we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought he could safely release him." (Emphasis added.) 212 U.S. 78, 84.

Clearly *Moyer* is distinguishable from the instant case. Whereas in *Moyer* the parties agreed that a state of insurrection existed, in the present case the parties do not so agree. In fact, not even the Governor of Ohio agrees that there was an insurrection, since he never used or implied such a thing even in his own after-the-fact Proclamation of May 5, 1970. Secondly, in *Moyer*, it was agreed by the parties that the Governor there had acted in good faith. The allegations of the complaints of petitioners in this action are hardly consistent with any such conclusion, and there is nothing in Governor Rhodes' Proclamation which suggests that he acted in good faith. That is surely a question of fact which is in issue in this case.

Thus, in *Moyer*, this Court reached a conclusion based upon the facts stipulated by the parties, which included the good faith of the Governor and the existence of a state of insurrection. Confronted with those stipulated facts, this Court, in *Moyer*, held as follows:

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief . . . it is not alleged that his judgment was not honest, if that be material, or that the Plaintiff was detained after fears of the insurrection were at an end." (Emphasis added.) 212 U.S. 78, 85.

More to the point is the subsequent decision of *Sterling v. Constantin*, *supra*. In that case suit was brought by the plaintiffs to enjoin the Governor of Texas and national guard generals from enforcing military and executive orders regulating and restricting the production of oil in plaintiffs' oil wells. The Governor of Texas had proclaimed a state of insurrection, tumult, riot and breach of

peace, had declared martial law, and had ordered generals to "enforce and uphold the majesty of the law." 287 U.S. 378, 387. The motive asserted was preventing plaintiffs from wasting oil. Plaintiffs alleged a conspiracy on the part of the Governor and the generals. Plaintiffs' claim was premised upon the alleged unconstitutionality of the orders which limited the oil production. It should be noted that the plaintiffs in *Sterling, supra*, were not thrown out of court at the pleading stage as in petitioners' cases herein. The district court did make findings of fact which concluded that there was no riot, tumult, insurrection, or state of war, but merely breaches of the peace.

The language of the court in *Sterling, supra*, is so clearly pertinent to the facts and legal issues of this case that petitioners set it forth as the best possible expression of their position on the subject of executive immunity:

"And, when the federal court, finding his [the Governor's] action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene, and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is

obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (article 3, § 2), and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that, when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts." (Emphasis added.) 287 U.S. 378, 397-398.

While the Court, in *Sterling*, asserted that the decision of a governor regarding his discretion in determining the existence of an exigency requiring military aid is "conclusive", the allegations in petitioners' complaints clearly refer to more than the mere determination of an exigency requiring military aid. The complaints of petitioners with respect to the Governor of Ohio go well beyond such a determination. These complaints refer to a conspiracy, as well as individual actions, which were specifically intended to violate petitioners' constitutional rights. It is not a question of determining a military exigency. It is a question of orders given and measures taken with regard to meeting that claimed exigency. Those latter actions are clearly subject to judicial review as indicated in *Sterling*, *supra*:

"The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for, without such liberty to make immediate decisions, the

power itself would be useless. Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace." (Emphasis added.) 287 U.S. 378, 399-400.

* * * * *

"It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." (Emphasis added.) 287 U.S. 378, 400.

It would seem, therefore, beyond reasonable dispute that petitioners' claims are well within the precedent of *Sterling, supra*.

Moreover, this Court has not hesitated to intervene to check the unlawful exertion of power by an executive, including even the President of the United States. Thus, this Court refused to endorse the suspension of civil rights and remedies by President Lincoln in *Ex parte Milligan*, 71 U.S. (4 Wall. 2) (1866). Similarly, this Court restrained President Truman from unlawfully seizing steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The circuit court majority gave much weight to the legislative and judicial immunities which this Court has allowed in *Pierson v. Ray*, 386 U.S. 547 (1967) and *Tenney v. Brandhove*, 341 U.S. 367 (1971). Judge Weick

specifically noted in his opinion (Opinion of Judge Weick, Scheuer Appendix, page 12a):

"And since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the executive."
(Emphasis added.)

Thus, it would appear that the logic of the lower courts' reasoning leads to an "extension" of the immunity doctrine to the executive. This Court, for several reasons, should not affirm such an arbitrary "extension". As Judge Celebrezze noted, and petitioners believe quite correctly so (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, pages 44a-45a):

"It is difficult to envision what, if any, remedy would remain under Section 1983 if, in addition to those persons who can bring themselves under legislative or judicial immunity, the broad class of persons who might be characterized as state executive officials is also immune from suit under the statute."

Moreover, such an "extension" of immunity to the executive would leave the citizen without any redress for violations of federal constitutional rights, and would seriously endanger the citizenry by creating a situation in which state executives and state officials could exercise unbridled license with impunity. After all, the Civil Rights Act is nothing less than a tort remedy created by Congress for violations of federal constitutional rights. One of the traditional functions of the tort law is to deter misconduct. When the law is removed, so is the deterrent. It is fair to assume that Congress intended that one of the effects of the Civil Rights Act would be to deter unconstitutional misconduct by state officials.

Finally, as noted by Judge Celebrezze, the executive immunity was not as firmly established from a historical

standpoint at the time of the passage of the Civil Rights Act, unlike the legislative and judicial immunities. (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, page 44a.)

An analysis of *Pierson* and *Tenney*, *supra*, support petitioners' aforementioned positions. In *Pierson*, a damage action was brought under the Civil Rights Act alleging a claim against city officials and a municipal police justice for false arrest and imprisonment. While this Court held that the officers were entitled to good faith and probable cause defenses but not to absolute immunity, this Court also held that the judge was immune for acts within his judicial role. Even in *Pierson*, there was a trial at which evidence was introduced, unlike in the instant cases. That evidence demonstrated that the plaintiffs were arrested for "sitting in" at segregated facilities in a southern bus terminal, specifically, in a "white only" waiting room. This Court noted specifically with respect to defendant Judge Spencer that:

"The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before this court." [Footnote—there was no evidence of conspiracy on the part of Judge Spencer with other defendants demonstrated at the trial.] 386 U.S. 547, 553.

This Court then went on to refer to the "solidly established doctrine of judicial immunity." 386 U.S. 547, 553.

Moreover, in *Pierson*, this Court pointed out "that the legislative record gives no clear intent that Congress [in enacting the Civil Rights Act] meant to abolish wholesale all common law immunities." 386 U.S. 547, 554.

There are several observations petitioners would have this Court consider regarding the judicial immunity. First

of all, even that immunity has been withheld. For example, in *Ex parte Virginia*, 100 U.S. 339 (1897), this Court held that a magistrate could be criminally prosecuted under the criminal provisions of a civil rights statute making it a crime for "any officer or other person, charged with any duty in the selection or summoning of jurors" to disqualify grand or petit jurors "on account of race, color, or previous condition of servitude". In *Ex parte Virginia*, *supra*, this Court refused to extend to the magistrate judicial immunity from prosecution, holding that:

"Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. . . . But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute?" 100 U.S. 339, 348-9.

It should be noted that in *Pierson*, *supra*, proof and allegations were lacking as to Judge Spencer "playing any role in these arrests and convictions" other than making a finding of guilt. In *Pierson*, *supra*, this Court did not overrule *Ex parte Virginia*, *supra*, either expressly or by implication. *Ex parte Virginia* was specifically cited by Justice Douglas in his dissent in *Pierson*, *supra*.

In the present cases, the allegations of petitioners with respect to the Governor and generals go beyond the kind of limited role played by Judge Spencer in merely making a finding of guilt. The Governor, according to petitioners' allegations, played a rather active role, individually and in conspiracy, in killing innocent people. Thus petitioners' claims fall within the ambit of *Ex parte Virginia*, *supra*, which is still viable precedent.

Moreover, there is the additional consideration that a judicial determination, no matter how grievously it in-

fringes a citizen's constitutional rights, is always correctable by a judicial review of that decision. Indeed, there is the remedy of reversal where a judicial injustice occurs. This is unlike the present situation where the taking of life without due process of law is irrevocable. At least a judicial decision is subject to judicial review. But respondents would have it that an executive's decision is not subject to judicial review. Judge Weick suggests that "since the courts have granted to themselves absolute immunity it would seem incongruous for them not to extend the same privilege to the Executive." (Opinion of Judge Weick, Scheuer Appendix, page 12a.) Petitioners suggest, however, that since judicial decisions are subject to judicial review, it would seem incongruous not to extend the same judicial review to executive decisions.

Turning to the legislative immunity, the signal decision of this Court is *Tenney v. Brandhove*, *supra*. In *Tenney*, a California Senate Fact-Finding Committee on UnAmerican Activities and its individual members were sued by the plaintiff, Brandhove, who claimed that his federal constitutional rights were violated by those defendants on the basis that they maliciously called him as a witness for the purpose of intimidating him, and that they inspired local prosecuting attorneys to institute criminal proceedings against him, and that he was used as a tool of the Committee to smear a mayoral candidate. In addition, the defendants were allegedly being motivated by a desire to unconstitutionally punish Brandhove for circulating a petition in the California Legislature to convince that body not to continue to fund the Committee.

This Court held that that suit was barred on immunity grounds.

Again, this Court relied primarily upon historical premises in reaching the conclusion that Congress, in

enacting the Civil Rights Act, did not intend to abrogate the common law legislative immunity. This Court reasoned as follows:

"We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S. 367, 376.

Moreover, the Federal Constitution specifically implies a legislative immunity for the specific conduct involved in the *Tenney* allegations, *supra*. Article I, Section 6 of the Constitution reads as follows:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place." (Emphasis added.)

By way of general observation, it should be noted that what takes place in a legislative proceeding is inherently part of the fundamental concept of Freedom of Speech guaranteed in the First and Fourteenth Amendments. To infringe upon the prerogatives of a deliberative body involves an encroachment upon the essential freedom of expression and thought which is indispensable to the legislative process. Moreover, actions of a state legislature, particularly those involved in the basic legislative process such as debate and investigation, are less likely to cause harm without any prospect of redress, unlike executive action. That is to say, a legislative action by its nature is generally cumbersome, and an aggrieved

individual, like Brandhove, has at least the remedy of attempting to vindicate his name by petitioning the legislature not to fund the committee and by voicing his objections in the public forum. Indeed, Brandhove did these things. In short, the best cure for bad speech is more speech. Thus, even a maliciously oriented and perversely motivated legislative committee is in no position to commit the kind of grievous harm that can be committed by a governor exercising authority over troops carrying weapons of death. There is no answer at the receiving end of an M-1 bullet.

In summary, there is absolutely no justification for this Court to extend the legislative and judicial immunities under the Civil Rights Act to include the executive branch of the government. Indeed, there is sound basis for not so extending the immunity.

The history of the Civil Rights Act bespeaks its fundamental role in deterring unconstitutional executive action and providing for redress in such instances. Cf. *Mitchum v. Foster*, *Monroe v. Pape*, *Zwickler v. Koota*, and *Perez v. Ledesma*, (Opinion of Justice Brennan, concurring in part and dissenting in part), *supra*.

The circuit court relied additionally on the decisions in *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949) and *Barr v. Matteo*, 360 U.S. 564 (1959). Those decisions are inapplicable to the instant cases. In *Gregoire*, *supra*, the plaintiff, a non-citizen, contended that he was falsely arrested by federal officers as an enemy alien, alleging malice and ill-will in connection with the alleged false arrest. The court held that the federal officers were absolutely immune from suit, notwithstanding the allegations of malice. Thus, the court held that the plaintiff failed to state a cause of action in his complaint. Although the suit, in part, was brought ostensibly under 42 U.S.C. § 1983, the

court similarly rejected the applicability of Section 1983 for the obvious reason that the suit was against federal officers, and thus not against any person acting under color of state law. Obviously, the Civil Rights Act applies by its terms to actions against state officials, as opposed to federal officials. Thus, the court in *Gregoire, supra*, was not faced with a complaint which was brought under the authority of the Civil Rights Act. This becomes apparent in reviewing the language of the court:

"Section 43 is so plainly limited to acts done under color of some state or territorial law or ordinance that no discussion can make it clearer than appears from its reading." 177 F.2d 579, 581.

* * * * *

"The decision on which the plaintiff relies [*Picking v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3rd Cir. 1954)] indeed holds that the doctrine of absolute immunity for official acts does not cover claims arising under Section 43 of the Civil Rights Act; but it is not in point because as we have just said, the case at bar is not within that section." (Emphasis added.) 177 F.2d 579, 582.

The fact that *Gregoire, supra*, was not brought under Civil Rights Act cannot be overlooked. Although it is true that Judge Hand advanced elaborate reasoning in support of his concept of absolute immunity in the dicta of his decision, that reasoning is not only dangerously defective, but also without application to an Act of Congress. As has been noted by this Court on numerous occasions, the Civil Rights Act was passed by Congress to interpose the judiciary between the power of the state and the rights of the individual. The Civil Rights Act dealt with the fundamental relationship, not between the federal government and the citizen, but between the state and the citizen. A suit against federal officials does not

fall within the logic, purpose and intent of the Civil Rights Act. Moreover, the fundamental premise upon which Judge Hand based his argument in favor of absolute executive immunity is contrary to the recognized function and intent of the Civil Rights Act as a tort remedy. All of Judge Hand's arguments for executive immunity have already been considered and resolved to the contrary by the Congress of the United States in 1871, as evidenced by the enactment of 42 U.S.C. § 1983. Whatever "merit" there is to executive immunity in the view of Judge Hand, that "merit" has apparently been outweighed by other more important considerations in the minds of the legislators who enacted the Civil Rights Act of 1871. Cf. *Mitchum v. Foster*, *Monroe v. Pape*, *Zwickler v. Koota*, and *Perez v. Ledesma* (Opinion of Justice Brennan concurring in part and dissenting in part), *supra*.

Moreover, the reasoning of Judge Hand in *Gregoire*, *supra*, has been criticized. One such expression of criticism is found in the concurring opinion of Judge Merrill of the Ninth Circuit in the case of *S & S Logging Co. v. Barker*, 366 F.2d 617 (9th Cir. 1966). Judge Merrill therein wrote as follows:

"I cannot agree with the majority that the *Gregoire* rule is a 'salutary' one. It operates to deprive a plaintiff of redress for torts actually and maliciously committed. This unjust result is, in *Gregoire*, apologetically swallowed as the lesser of two evils for the reason that otherwise the zeal of federal officers in carrying out their official duties would be impaired. Cf. *Prosser on Torts*, pp. 803, 1014-18 (3rd ed. 1964), and comments there cited." 366 F.2d 617, 626.

Other courts have made similar expressions in actions under Section 1983. For example, in *Beauregarde v. Wingard*, 230 F. Supp. 167 (S.D. Cal. 1964), the district court overruled a motion to dismiss an action brought

under 42 U.S.C. § 1983, where it was alleged that police officers, who arrested plaintiff, acted without cause, maliciously and intentionally, in violating plaintiff's rights under the Fourteenth Amendment. That court, in full awareness of the dicta of Judge Hand in *Gregoire, supra*, having quoted same at length (230 F. Supp. 167, 172-3), held as follows:

"A suit under Section 1983 of Title 42 U.S.C.A. of course involves the prohibition of a federal statute, and it is a familiar doctrine that such a statute may not be set at naught or its benefits denied by state statutes, state common law rules, or state decisional law." 230 F. Supp. 167, 173.

Still another example of judicial criticism of *Gregoire, supra*, is found in the decision of *Kelley v. Dunne*, 230 F. Supp. 969 (1964), reversed and vacated in 344 F.2d 129 (1st Cir. 1965). *Kelley, supra*, involved a complaint against a postal inspector for defamation and for unlawful search and seizure of plaintiff's property. In the district court the defendant moved to dismiss on the ground that at all times "he was acting pursuant to regulations and directions of the Post Office Department of the United States." 230 F. Supp. 969, 970. The lower court upheld the defendant's contention of immunity and dismissed plaintiff's action primarily on the authority of Judge Hand in *Gregoire, supra*. The first circuit court thereafter reversed the lower court's dismissal, rejecting the applicability of *Gregoire, supra*, after a detailed discussion of that decision. The First Circuit Court of Appeals reasoned that "where an officer knows that he is acting out of the ordinary, he is on notice of the circumstances, and there is more reason for him to have to justify his conduct." (Emphasis added.) 344 F.2d 129, 132. In the instant cases, Governor Rhodes certainly knew he was "acting out of

the ordinary . . . and there is more reason for him to have to justify his conduct."

Finally, the lower courts also relied upon the decision of this Court in *Barr v. Matteo, supra*. In *Barr*, the plaintiff sought damages for libel against a federal employee who made statements in connection with a press conference. *Barr, supra*, is easily distinguishable for several reasons: first, there was no allegation in the complaint of any unconstitutional act on the part of the defendant. Secondly, there was no allegation that the federal employee was acting under color of any state law. Indeed, the action was not brought under 42 U.S.C. § 1983 as is petitioners' action. Thus, all of the justifications for immunity involving a federal official would not apply where this Court is reviewing allegations brought under an Act of Congress specifically designed to reach the actions of state officials who violate the constitutional rights of citizens. For the same reason that *Gregoire, supra*, is inapplicable, so too is *Barr, supra*, inapplicable to the instant cases. Whatever logic was advanced in *Barr* in support of an executive immunity, that logic does not apply where Congress has specifically expressed an intention to create a cause of action against a specific state official.

In summary, then, this Court should reject the application of a new executive immunity to actions brought under the Civil Rights Act. Here we have a Governor, commanding generals and guardsmen who have allegedly committed unconstitutional actions resulting in the deaths and maimings of innocent students on a college campus. These individuals should not be immune from the operation of the law, nor should they be above the law. Congress has passed an enactment pursuant to the Fourteenth Amendment which, if it means anything, surely means that liability attaches to executive abuse. These are obvi-

ously such cases, alarming in their allegations of the excessive use of official force. The Kent incident, so extraordinary an occurrence, will undoubtedly become a permanent and tragic part of American History. A finding by this Court that under the extreme and exceptional circumstances of the Kent State shootings the aggrieved parties have a right of redress in the courts will hardly hamstring future governors and military officials in the legitimate exercise of their authority; a decision in favor of petitioners that they may seek redress in court will surely serve as an appropriate judicial check on the excessive and unconstitutional abuse of power by state officials, from the governor to the guardsmen to the University President. It may help to avoid another Kent State tragedy by giving effect and meaning to the deterrent that Congress intended in enacting the Civil Rights Act in 1871.

IV. WHERE CITIZENS OF PENNSYLVANIA AND NEW YORK BRING DAMAGE ACTIONS IN FEDERAL COURT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD, THESE DEFENDANTS ALL BEING CITIZENS OF OHIO, FOR COMMITTING INDIVIDUALLY AND IN CONSPIRACY THE WANTON KILLING OF INNOCENT STUDENTS ON A COLLEGE CAMPUS, AND WHERE AN OHIO STATUTE (OHIO REVISED CODE §5923.37) SPECIFICALLY PROVIDES FOR LIABILITY UNDER SUCH CIRCUMSTANCES, DOES A FEDERAL COURT HAVE JURISDICTION BASED UPON THE DIVERSITY OF CITIZENSHIP OF THE PARTIES?

Judge Celebrezze in his dissent writes as follows (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, pages 68-69):

"Without having heard evidence respecting the allegations of intentional, willful, and wanton misconduct, the District Court could not properly dismiss the

wrongful death actions as against these defendants-appellees.

I therefore believe that the District Court erred in dismissing the wrongful death actions set forth in the Krause and Miller complaints, which were before the court under its original, diversity jurisdiction. These actions are not barred by the Eleventh Amendment."

Judge Celebrezze's reasoning is the only reasoning with respect to the diversity basis of jurisdiction, since neither Judge Weick nor Judge O'Sullivan dealt with the issue at all.

Congress established federal diversity jurisdiction in 28 U.S.C. §1332. Petitioners' complaints allege a cause of action under state law, namely, Ohio Revised Code §5923.37, which reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct." (Emphasis added.)

The allegations of the pleadings bring this action within Ohio Revised Code §5923.37. This statute supersedes and waives any immunity otherwise available to the State of Ohio. It creates a cause of action such as the one alleged in the pleadings in this case. The basis of jurisdiction in this instance is not premised upon the existence of a federal question, but rather is premised upon the existence of a state statute providing for redress in a given situation. Where there exists diversity of citizenship of the parties, an action may be brought in federal court upon a state claim. Such an action, as in this case, is not barred by the Eleventh Amendment, where the state law clearly provides for liability of individuals, namely "members"

of the organized militia. This serves to emphasize how strained it is for the lower court to assert that these actions are being brought against the sovereign, and not against individuals. The state law itself provides for these actions in its own courts against individuals. The federal court has an obligation to recognize state law in this regard. Moreover, there is no state sovereign immunity which would immunize members of the organized militia from liability. This is not a suit against the State of Ohio as an entity, claiming damages recoverable from the state treasury, as in *Krause, Admr. v. State of Ohio*, 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972). Moreover, to the extent that Ohio seeks to claim sovereign immunity (assuming *arguendo* that the present action were against the State of Ohio), the application of the doctrine of state sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf. the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause, Admr. v. State of Ohio, supra*.

The term "wanton misconduct" as used in Ohio Revised Code §5923.37 comprehends the kind of conduct alleged in the complaints. Thus, in *Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567 (1936), the Supreme Court of Ohio defined wanton misconduct as follows (at page 568):

"... such misconduct as manifests a disposition to perversity and ... under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious under such surrounding circumstances and existing conditions that his conduct will in all common probability result in injury." (Emphasis added.)

Similarly, in *Kellerman v. J. S. Durig Co.*, 176 Ohio St. 320 (1964), the Ohio Supreme Court defined wanton misconduct as follows (at page 320):

"Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was actually known, or in the circumstance ought to have been known to the defendant." (Emphasis added.)

See also the cases of *Gossett v. Jackson*, 100 Ohio App. 2d 121, 226 N.E. 2d 142 (1965); *Reserve Trucking Co. v. Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934); *White v. Harvey*, 170 Ohio St. 262, 163 N.E. 2d 898 (1960); *Botto v. Fischesser*, 174 Ohio St. 322, 189 N.E.2d 127 (1963); *Roszman v. Sammet*, 20 Ohio App. 2d 255, 254 N.E.2d 51 (1969).

For these reasons, the Circuit Court erroneously disregarded the diversity claims, and this Court should reverse the Circuit Court with respect to those claims.

V. IS THE UNITED STATES A NECESSARY PARTY IN A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES ALLEGING THAT THESE DEFENDANTS, ACTING INDIVIDUALLY AND IN CONSPIRACY UNDER COLOR OF STATE LAW, COMMITTED INTENTIONAL DEPRIVATIONS OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983?

Judge Weick, writing for the majority below, asserted as follows (Opinion of Judge Weick, Scheuer Appendix, page 19a):

"It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action. Rules 12(b) and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the training and weaponry of the guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the court. The United States has not consented to be sued." (Emphasis added.)

This holding of Judge Weick is erroneous. The United States is not a necessary party based upon the plain allegations of the complaint. Simply because the United States was "involved" in the training of the National Guard and their use of weaponry does not necessitate that the United States be named as a defendant. We are here dealing with the alleged misconduct of state officials acting under color of state law. There is absolutely no allegation relating to involvement of federal officials. Moreover, as contended in the preceding section, with respect to the State of Ohio, any bar to this action premised upon the failure of the United States to consent to suit violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Inasmuch as the Circuit Court, in part, premised its holding on the necessity of the United States as a party defendant, a conclusion altogether unjustified by the allegations, this Court should reverse the Circuit Court.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the United States Sixth Circuit Court of Appeals, and remand this case so as to permit petitioners to proceed with discovery and proof in connection with their claims.

Respectfully submitted,

STEVEN A. SINDELL

JOSEPH M. SINDELL

SINDELL, SINDELL, BOURNE, STERN & SPERO

1400 Leader Building

Cleveland, Ohio 44114

(216) 781-8700

Attorneys for Petitioners,

Elaine B. Miller and Arthur Krause

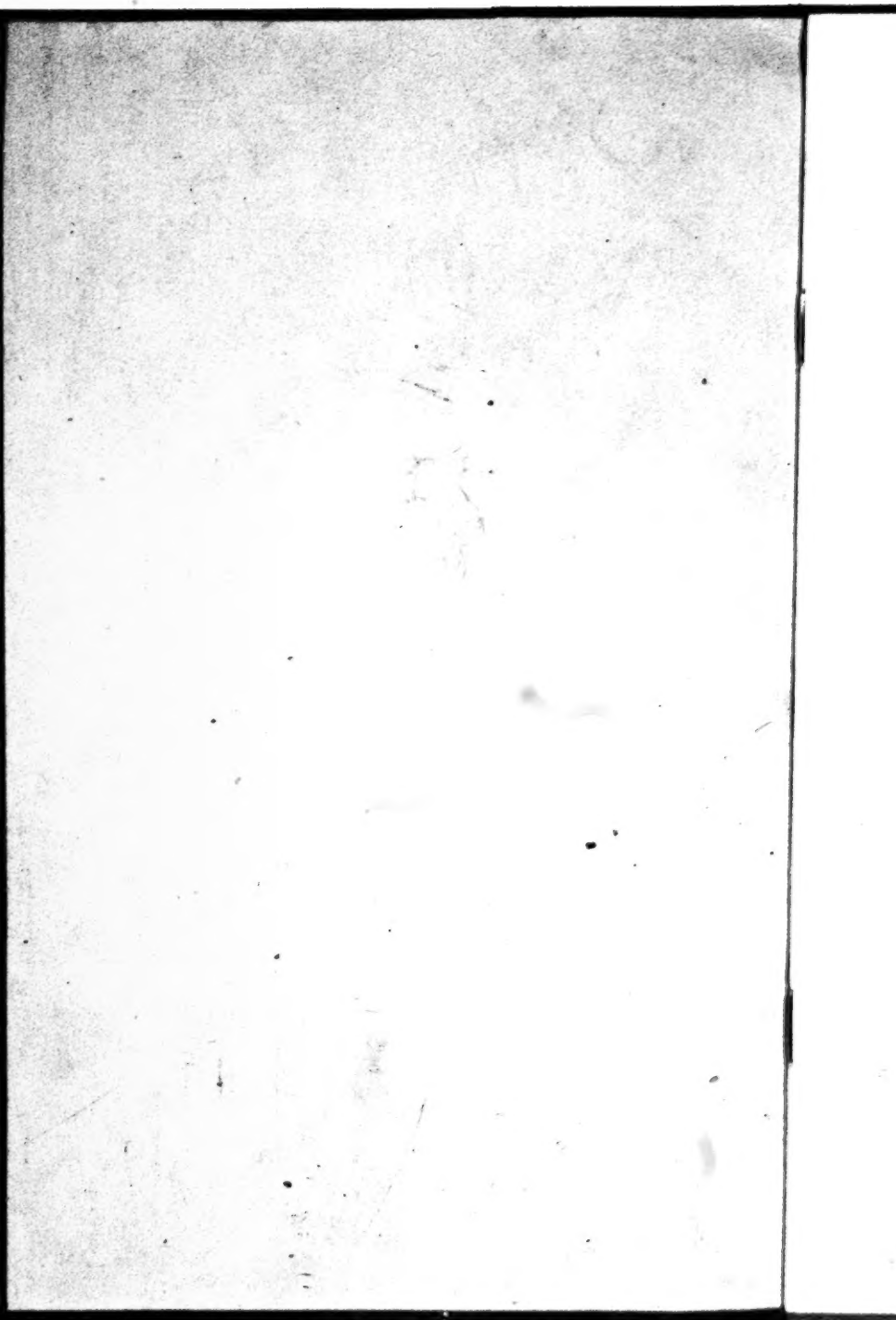
JOSEPH KELNER

KELNER, STELLJES & GLOTZER

217 Broadway, Suite 600

New York, New York 10007

Attorney for Petitioner, Elaine B. Miller



MOTION FILED

LIBRARY

AUG 25 1973

SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1973

No. 72-914

SARAH SCHEUER, etc.,

Petitioner,

VS.

JAMES A. RHODES, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT**

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE KENT LEGAL DEFENSE FUND

BENJAMIN B. SHEERER

DAVID SRIENNER

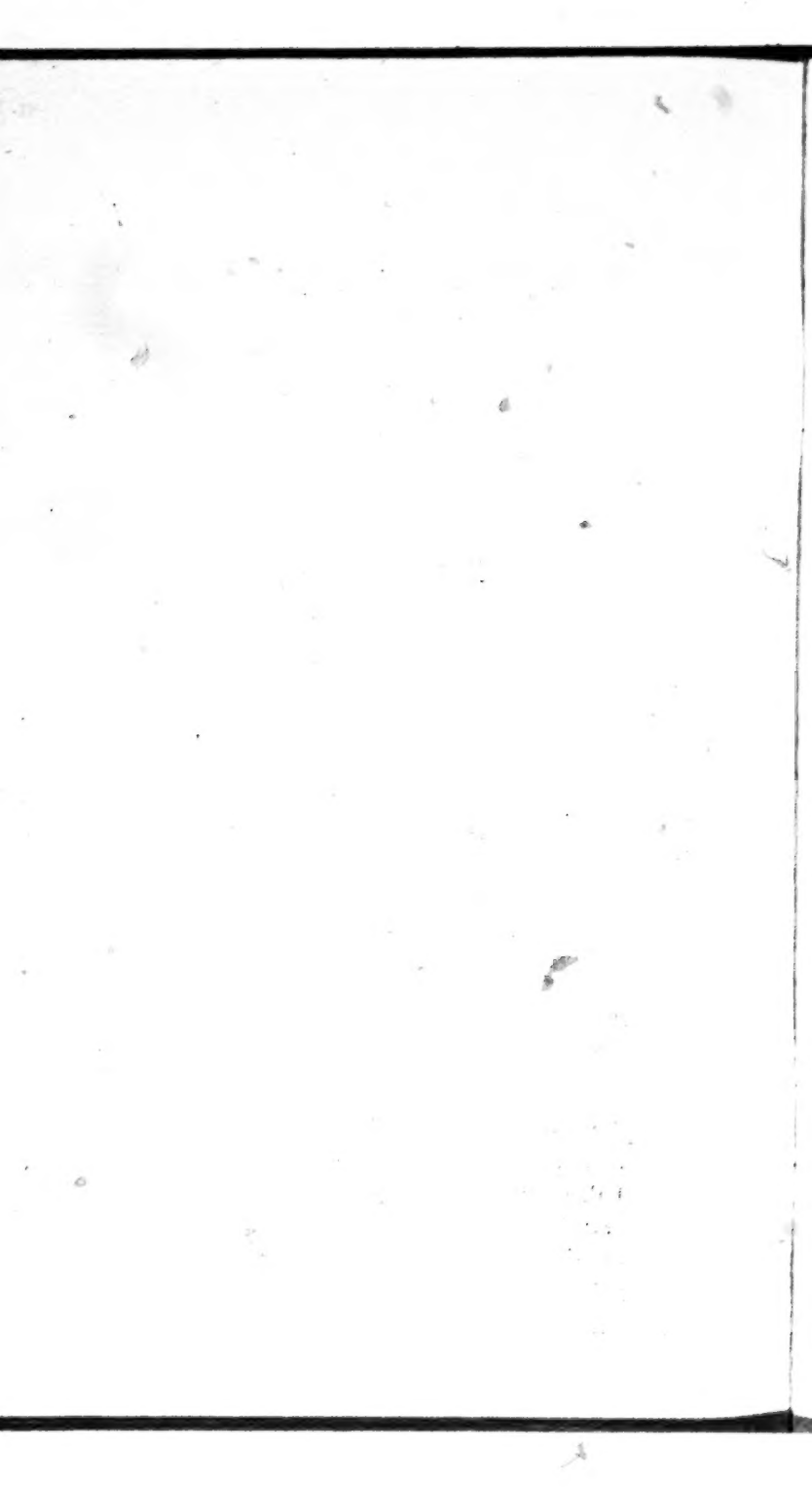
33 Public Square

Cleveland, Ohio 44113

Attorneys for Amicus Curiae

Of Counsel:

WILLIAM T. WHITAKER



Supreme Court of the United States

October Term, 1973

No. 72-914

SARAH SCHEUER, etc.,

Petitioner,

vs.

JAMES A. RHODES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Kent Legal Defense Fund (KLDF) respectfully moves the Court for leave to file the within Brief of Amicus Curiae.

KLDF is a non-profit Ohio Corporation organized to defend the students and faculty members accused of crimes as a result of the events at Kent State University, May 1 through May 4, 1970. The KLDF is composed of students and faculty of Kent State University and other residents of the area of Kent, Ohio. They lived through and were affected beyond measure by the killings which are the subject matter of the cases now before the Court.

The facts and circumstances set out in the within Brief are peculiarly within the knowledge of the KLDF. They are not likely to be brought to the Court's attention by the parties, but may be of value to the Court in resolving these cases.

More specifically, the matter contained in the Brief will demonstrate that the events at Kent had manifold ramifications, none of which have been thoroughly investigated and analyzed, and further that in events of these kinds a Federal forum is particularly necessary to ensure citizens of justice untrammelled by local passions and manipulation.

Respectfully submitted,

BENJAMIN B. SHEERER

DAVID SCRIBNER

Attorneys for Amicus Curiae

BRIEF OF AMICUS CURIAE

The founding fathers foresaw the necessity of independent Federal Courts and Federal jurisdiction to protect citizens against matters contaminated with local passion. The Federalist 78, 79, 81 (Hamilton). The Congress and people have also seen this need and have placed certain matters within the protection of the Federal judiciary. (Fourteenth Amendment, 42 U.S.C. 1983, 28 U.S.C. 1343) The events related hereafter demonstrate the wisdom of these enactments.

The Kent Tragedy

In April 1970 President Nixon announced the invasion of Cambodia and shortly thereafter he called student demonstrators opposed to the war in Southeast Asia "bums". In reaction to these events, students at Kent State University began a series of protest demonstrations against the government's war policies in Southeast Asia. Kent State is Ohio's second largest state university and is located in rural Portage County.

On May 1 and 2 some students allegedly destroyed property in the city of Kent and on the campus (including the burning of the campus ROTC building). On May 2nd, Governor James A. Rhodes ordered the Ohio National Guard to Kent. At that time, the Governor was locked into a hotly contested primary battle with Senator Robert A. Taft. On May 3rd, the Governor visited the Kent Campus and in a televised press conference he bitterly

denounced the students, comparing them to brownshirts, nightriders, and communists.¹

On May 3, the National Guard broke up a sit-in demonstration at the edge of the Kent campus. Tear gas and bayonets were employed and hostility between students and the National Guard grew.

On May 4, 1970, shortly before noon, students gathered on the Commons at Kent State to protest the war in Southeast Asia and the presence of the National Guard on the campus. When the students did not yield to National Guard demands to end the rally, the Guard proceeded to disperse them by means of tear gas and armed formations of troops. In the ensuing action, members of the National Guard fired their weapons killing four students and wounding nine others.

The State Orders a Special Grand Jury

Against the background of tragedy and the intense publicity generated by the shootings, the Portage County Prosecuting Attorney decided that the County could not afford to investigate the events without a special financial grant from the State of Ohio.²

Governor Rhodes reviewed this request with his Attorney General and determined that under state law it could not be honored. The Governor decided, however, that he could direct his Attorney General (Paul W. Brown)

1. The Governor has said he was misquoted. For an assessment of the impact of these words, whether he was misquoted or not, see: *Kent State*, James A. Michener, Random House, 1971, pp. 251, 252.

2. The matters set out hereafter were proved and are from the records in *King v. Jones*, 319 F. Supp. 653 (N.D. Ohio 1970) and *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971).

to conduct a Special Grand Jury to investigate the events at Kent.

The Attorney General was no stranger to the Kent events. Prior to Governor Rhodes' direction he had told the news media that he had no expectations that National Guardsmen would be indicted and that he "would be surprised if any Guardsmen were indicted".

Attorney General Brown proceeded to appoint three special Counsel to conduct the Special Grand Jury. On September 5th, 1970 and before the Grand Jury was seated, the judges of the Portage County Court of Common Pleas issued an extensive order.

The order excluded the news media from the Courthouse and made it clear that only persons with business at the Courthouse were to be found there. Of particular interest were paragraphs 5 and 7:

(5) Witnesses, prospective and selected jurors, and those persons summoned but excused from serving as Special Grand Jurors, are forbidden to participate in interviews and from making statements for publication from the date of the entry of this order and until such time as this Court shall see fit to vacate this order.

(7) All lawyers participating in the proceedings of this Special Grand Jury, their office associates, staff members and employees under their supervision and control are forbidden to take part in interviews for publication and from making extrajudicial statements from the date of this order and until such time as the Court shall vacate this order. Canon 20 of the Canons of Professional Ethics of the American Bar Association is hereby incorporated in and made a part of this order in so far as the same is applicable.

The Grand Jury was formally convened on September 14, 1970. Among the instructions given the jury was the following:

As a Grand Jury you are not a trying body. You are simply an accusing body. Therefore it is not your province to determine in any case whether a person who may be accused of having committed a crime or offense is really guilty.

A day or two after the Grand Jury was charged, however, the presiding Judge Edwin W. Jones, suggested to the Foreman, a former client and close friend, that the Grand Jury issue an essay report describing what had occurred at Kent State in May, 1970. Thereafter, the report was the subject of a luncheon meeting at a country club in Portage County. Attorney General Brown, his three special counsel, and the Grand Jury Foreman participated. The meeting discussed the content and format of the report.

The Chief Special Counsel, Robert Balyeat, himself prepared a draft of the first portions of the report. Thereafter, he and the foreman participated in writing and re-writing the drafts of the final portions of the report. Attorney General Brown saw at least two drafts of the report before its release. He testified that he had legally approved it before it was released.

On October 14, 1970 the Court of Common Pleas issued another order stating that it had:

come to the attention of the Court that the Special Grand Jury convened at the Portage County Courthouse on September 14, 1970 will be shortly completing its work and rendering its report to the Court

The Court then proceeded to ban all demonstrations, picketing, leafletting in the environs of the Court between 8:00 a.m. and 5:00 p.m. of each day. The next day this ban was extended to any hour of the day or night.

On the other hand, the Court suggested that some form of press conference be held when the Jury reported. Consequently, a second order issued on October 15, 1970 which provided:

Special Counsel for the Attorney General may hold one (1) press conference on October 16, 1970 at which they *may present to the news media* that portion of the report of the Special Grand Jury which is not secret and may answer only general questions pertaining to such portions of the report of the Special Grand Jury without giving evidence presented to the said Special Grand Jury or making any interpretation of such report. (Emphasis added.)

The Grand Jury then reported, returning thirty indictments against twenty-five persons and with the indictments an essay report commenting on the very events which were the subject of the indictments. Seventeen of the twenty-five persons indicted were charged with actions occurring on May 4, 1970 when the students were killed.

In the City Building of Ravenna, Ohio, the Special Counsel met with a hundred representatives of the news media to "present" this report. Copies of the report were made available to the media. (Of course, anyone who might have responded to the allegations in the report was under order of the court to remain silent.)

Shortly thereafter the report and its conclusions were nationwide, front page news. The Record-Courier, which serves the Kent community, ran the entire text of the report in its edition for that day.

The Grand Jury Report

The Report was a broadside attack on the university, its students, faculty and administration. It consisted of 18 pages purporting to authoritatively cover the events of May 1-4. The Report stated that "[t]he Grand Jurors have determined numerous questions of fact relative to the issues presented." It then proceeded to record those determinations of fact—no less than seventy in all. These facts were beyond doubt, it said. *It absolved the National Guard, but never once directly mentioned the killings.*

A typical passage of the report found:

... that the major responsibility for the incidents occurring on the Kent State University campus on May 2nd, 3rd and 4th rests clearly with those persons who are charged with the administration of the University. To attempt to fix the sole blame for what happened during this period on the National Guard, the students or other participants would be inconceivable. The evidence presented to us has established that Kent State University was in such a state of disrepair, that it was totally incapable of re-acting (sic) to the situation in any effective manner. We believe that it resulted from policies formulated and carried out by the University over a period of several years, the more obvious of which will be commented on here.

Another finding was:

A second example of where the University has obviously contributed to the crisis it now faces is the over-emphasis which it has placed and allowed to be placed on the right to dissent. Although we fully recognize that the right of dissent is a basic freedom to be cherished and protected, we cannot agree that the role of

the University should be to continually foster a climate in which dissent becomes the order of the day to the exclusion of all normal behavior and expression.

As might be expected, the president of Kent State University wished to reply to the report. Several requests for relaxation of the Court's gag order were unsuccessful. Finally, however, the Court issued a supplemental order granting President Robert I. White permission to hold two meetings on the report, but he was ordered to:

refrain from any critical comment regarding the report of the special Grand Jury.

Although President White felt constrained by the gag order, Special Prosecutor Seabury Ford did not. He granted an interview to a reporter of the Detroit Free Press in which he said that the National Guard should have killed more students. The Portage County Bar Association preferred charges against Ford for violating the gag order. He entered a plea of guilty for having given the interview.

Post-Report Litigation

The first case to be filed in the wake of these events was *King v. Jones*, 319 F. Supp 653, reversed in 450 F.2d 478 (6th Cir. 1971), but judgment of Court of Appeals vacated and case returned to District Court to be dismissed as moot at 405 U.S. 911 (1972). In *King* the District Court held that the absolute gag order on witnesses was unlawful after the Jury had reported. It also enjoined enforcing the ban on all demonstrations, leafletting and the like in the area of the Courthouse. Both these orders were held to be overbroad and hence trenching on First Amendment rights. The Court described the Grand Jury report as "essentially but one side of the argument".

Throughout the *King* litigation the state argued that the gag orders were issued solely from solicitude for the fair trial rights of the indictees. It was never explained why this concern served only to gag the indictees and members of the KSU community, but not the state.

The second case to follow the Grand Jury report was *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971) affirmed 450 F.2d 480 (6th Cir. 1971). *Hammond* was brought by the KLDF to attack the pernicious results of the Special Grand Jury.

After trial the District Court in a thorough opinion determined that the issuance of the report contravened the presumption of innocence, eroded the right to fair trial, violated state law as to separation of powers and impaired the First Amendment rights of non-indicted students and faculty at Kent State. The Court ordered the report physically destroyed by burning. It declined to enjoin the prosecutions.

After affirmance by the Sixth Circuit, the report was destroyed and the state began to press the indictments to trial. Two of the twenty-five indictees entered pleas of guilty. Another was found guilty of a misdemeanor in connection with the May 2nd burning of the ROTC building. Two more of the indictees were acquitted at trial.

On December 7, 1971 the state moved the Court to dismiss the indictments against all remaining defendants for lack of evidence. These motions were granted. *Included in these were all seventeen of the persons indicted for the events of May Fourth.* Welcome as the dismissals were to the defendants, they could not repair the damage done by the actions of the State briefly outlined above. The State had indicted some of the victims of May Fourth by means of a manipulated Grand Jury proceeding and

after they had undergone the agonizing pressures of being indicted for crimes, simply dismissed the cases without affording them opportunity for vindication in open court.

CONCLUSION

The importance of the Federal relief provided in *King* and *Hammond* was immense. It served to preserve in very difficult circumstances essential elements of our constitutional system—free speech, fair trial, and presumption of innocence, among others.

The whole course of the special Grand Jury proceedings and its aftermath shows, however, that it was orchestrated and manipulated to produce absolution for the Ohio National Guard. The beneficiaries of this operation include some of the parties before the Court in this case.

When the mechanism of the state legal system is bent to the uses of those in power and authority, then, more than ever, the Federal remedy must be available.

Respectfully submitted,

BENJAMIN B. SHEERER

DAVID SCRIBNER

Attorneys for Amicus Curiae

Of Counsel:

WILLIAM T. WHITAKER

AUG 27 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY
D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, Various Officers
and Enlisted Men, and ROBERT WHITE,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

MICHAEL E. GELTNER

LEONARD J. SCHWARTZ

American Civil Liberties Union
of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF

JOEL M. GORA

American Civil Liberties Union
Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL

33 Public Square
Suite 210
Cleveland, Ohio 44113

Attorneys for Petitioner

Of Counsel:

STANLEY K. LAUGHLIN

NIKI Z. SCHWARTZ

MICHAEL S. HARSHMAN

American Civil Liberties Union
of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

WALTER S. HAFFNER

1008 Standard Building
Cleveland, Ohio 44113

INDEX

	PAGE
Introductory Statement	1
Constitutional and Statutory Provisions Involved in the Case	2
Questions Presented	3
Statement of the Case	5
The Allegations of the Complaint	5
The Theory of the Complaint	8
Proceedings Below	9
ARGUMENT	
Introduction	11
Summary of Argument	11
I. The Court's decision on the merits must be made on the allegations of the complaint, liber- ally construed	13
II. The Eleventh Amendment to the United States Constitution does not bar suit in federal court against individuals for damages	16
III. The individual defendants sued in this action have no personal immunity from suit for the wrongs alleged in the complaint	27

	PAGE
IV. The decision in <i>Gilligan v. Morgan</i> does not preclude the granting of damages at law for the claims raised by the complaint	35
CONCLUSION	39

TABLE OF AUTHORITIES

Cases:

Anderson v. Nossner, 456 F.2d 835 (5th Cir. 1972)	9
Barr v. Mateo, 360 U.S. 564 (1959)	29, 31-32, 33, 34
Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966)	31
Bayer v. Chaloux, 288 F. Supp. 366 (N.D.N.Y. 1968)	22
Birnbaum v. Trussell, 347 F.2d 86 (2d Cir. 1965)	28, 29
Bishop v. Vandercock, 228 Mich. 299, 200 N.W. 278 (1924)	38
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), 456 F.2d 1339 (2d Cir. 1972)	12, 24, 25, 26, 29, 32, 35
Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 89 Sup. Ct. 401 (1968)	22
Bradley v. Fisher, 13 Wall. 335 (1872)	30
Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961)	34
Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) rev'd on oth. grnds., <i>sub nom.</i> District of Columbia v. Carter, 409 U.S. 418 (1973)	8, 9, 18, 23, 24, 28, 32, 34
Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966)	32

	PAGE
Chisholm v. Georgia, 4 Dall. 419 (1793)	19
City of Kenosha v. Bruno, 41 U.S.L.W. 4819 (1973)	17, 23
Conley v. Gibson, 355 U.S. 41 (1957)	13
Cox v. McNutt, 12 F. Supp. 355 (S.D. Ind. 1935)	38
Cruz v. Beto, 405 U.S. 319 (1972)	13
Curtiss Pub. Co. v. Butts, 388 U.S. 130 (1967)	33
District of Columbia v. Carter, 409 U.S. 418 (1973)	18, 23,
	24, 32
Doe v. McMillan, 41 U.S.L.W. 4752 (1973)	29, 30
Dombrowski v. Eastland, 387 U.S. 82 (1967)	30
Dugan v. Rank, 372 U.S. 609 (1963)	26
Employees of Dep't of Public Health and Welfare of Missouri v. Dep't of Public Health and Welfare of Missouri, 41 U.S.L.W. 4493 (1973)	19, 22, 23
Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)	38
Ex parte Young, 208 U.S. 123 (1909)	11, 20, 21, 22
Faubus v. United States, 254 F.2d 797 (8th Cir.), cert. denied, 358 U.S. 829 (1958)	38
Ford Motor Company v. Treasury Department of Indiana, 323 U.S. 459 (1944)	16, 17, 20
Georgia Railroad and Banking Co. v. Redwine, 342 U.S. 299 (1952)	21
Gilligan v. Morgan, 41 U.S.L.W. 4966 (1973)	4, 12, 35,
	36, 38
Gravel v. United States, 408 U.S. 606 (1972)	29
Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944)	16, 20
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949)	29, 32
Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964)	21

	PAGE
Haines v. Kerner, 404 U.S. 519 (1972)	13
Hammond v. Brown, 323 F. Supp. 362 (N.D. Ohio 1971), aff'd, 450 F.2d 480 (6th Cir. 1971)	14
Hans v. Louisiana, 134 U.S. 1 (1890)	19, 23
Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935)	38
Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972)	8
Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970)	8, 34
Jenkins v. McKeithen, 395 U.S. 411 (1969)	13
Jobson v. Heine, 355 F.2d 129 (2d Cir. 1965)	28
Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972)	28
Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939)	38
Katzenbach v. Morgan, 384 U.S. 641 (1966)	24
King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1971), rev'd 450 F.2d 478 (6th Cir. 1971), vacated and remanded on mootness grounds, 405 U.S. 911 (1972)	14
Krause v. Ohio, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972)	25
Krause v. Rhodes and Miller v. Rhodes (No. 72-1318) ..	9, 10
Larson v. Domestic and Foreign Corporation, 337 U.S. 682 (1949)	26
Lasher v. Shafer, 460 F.2d 343 (3d Cir. 1972)	35
McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) ..	28, 37
Mitchell v. Clark, 110 U.S. 633 (1884)	38
Monroe v. Pape, 365 U.S. 167 (1961)	8, 17, 18, 23, 30, 32, 34
Moor v. County of Alameda, 41 U.S.L.W. 4627 (1973) ..	17, 23
Moyer v. Peabody, 212 U.S. 78 (1909)	36, 37, 38

	PAGE
Neal v. Georgia, 469 F.2d 446 (5th Cir. 1972)	22
New York Times v. Sullivan, 376 U.S. 254 (1964)	33
Osborn v. United States Bank, 9 Wheat. 738 (1824)	21
O'Shea v. Stafford, 122 La. 444, 47 So. 764 (1908)	38
Parden v. Terminal R. Co., 377 U.S. 184 (1964)	20, 23
Picking v. Pennsylvania R.R. Co., 151 F.2d 240 (3d Cir. 1947)	32
Pierson v. Ray, 386 U.S. 547 (1967)	29, 30, 34
Powers Mercantile Co. v. Olson, 7 F. Supp. 865 (D. Minn. 1934)	38
Puckett v. Cox, 456 F.2d 233 (6th Cir. 1972)	8
Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917)	25
Re New York, 256 U.S. 490 (1921)	20
Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972)	8, 9, 28, 32, 34
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)	33
Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P.2d 582 (1933)	38
Sanial v. Bossoreale, 279 F. Supp. 940 (S.D.N.Y. 1967) ..	14
Screws v. United States, 325 U.S. 91 (1945)	8, 17
Smith v. Sperling, 354 U.S. 91 (1957)	14
Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)	22
Spalding v. Vilas, 161 U.S. 483 (1896)	31
State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947)	25
Sterling v. Constantin, 287 U.S. 378 (1932)	37, 38

	PAGE
Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963)	34
Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn. 1936)	38
Tenney v. Brandhove, 341 U.S. 367 (1951)	29, 30
United States v. Brewster, 408 U.S. 501 (1972)	29-30
United States v. Cigarette Merchandisers' Association, 18 F.R.D. 497 (S.D.N.Y. 1955)	14
United States v. Classic, 313 U.S. 299 (1941)	17
Walker v. Courier Journal and Louisville Times Co., 368 F.2d 189 (6th Cir. 1966)	35
Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172 (1965)	13
Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966)	35
Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969)	22
Williams v. United States, 341 U.S. 97 (1951)	17
Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959)	38
Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959)	25

Constitutional Provisions:

United States Constitution

Article I, §6, cl. 1	29
Article III	23
First Amendment	33
Fourth Amendment	24
Fifth Amendment	28

PAGE

Eleventh Amendment	2, 4, 10, 11, 12, 16, 17, 19, 20, 21, 23, 24, 26, 27
Fourteenth Amendment	8, 12, 21, 24, 25, 28

*Rules:***Federal Rules of Civil Procedure**

Rule 8	4
Rule 8(f)	13
Rule 12(b)	9
Rule 12(b)(1)	14

Statutes:

8 U.S.C. §43	32
28 U.S.C. §1254(1)	2
28 U.S.C. §1343	2, 7, 18
28 U.S.C. §1343(3)	3
28 U.S.C. §1343(4)	3
28 U.S.C. §1346	26
28 U.S.C. §2674	26
28 U.S.C. §2680	26
42 U.S.C. §1983	2, 3, 4, 5, 7, 8, 12, 17, 18, 24, 27, 30, 31, 32, 34

Other Authorities:

Borchard, <i>Governmental Liability in Tort</i> , 34 Yale L. J.	
1 (1926)	26
Cong. Globe, 42d Cong., 1st Sess. 788 (1871)	20

3 Davis, Administrative Law ¶27.03	21
2 Harper & James, The Law of Torts 1632-33 (1956) ..19, 31	
Jacobs, <i>The Eleventh Amendment and Sovereign Im-</i> <i>munity</i> 109-110 (1972)	19
Jaffe, <i>Suits Against Government and Officers: Sov-</i> <i>ereign Immunity</i> , 77 Harv. L. Rev. 1 (1963)	26
Kalven, <i>The Reasonable Man and the First Amend-</i> <i>ment</i> , 1967 Sup. Ct. Rev. 267	33
2A Moore, Federal Practice	
¶12.08	13
¶12.09	13
¶12.16	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY,
HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP,
Various Officers and Enlisted Men, and ROBERT WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

Introductory Statement

The Court granted a writ of certiorari in this case on June 25, 1973 to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's dismissal of the complaint. The opinion of the Court of Appeals is reported, *sub nom. Krause v. Rhodes*, at 471 F.2d 430 (6th Cir. 1972). The opinion of the district court has not been officially reported.

This suit was commenced in the United States District Court for the Northern District of Ohio, Eastern Division, with jurisdiction based upon 28 U.S.C. Section 1343, as well as the doctrine of pendent jurisdiction. The District Court dismissed the complaint on the stated ground that suit was barred by the Eleventh Amendment. Thereafter, timely appeal was taken to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court on November 17, 1972. The petition for a writ of certiorari to review the Court of Appeals' decision was filed on December 21, 1972.

Jurisdiction of this Court is invoked to review the Court of Appeals' decision pursuant to 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved in the Case

1. United States Constitution, Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State

2. Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. Section 1343(3) and (4), which provide:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Questions Presented

The following questions were presented by the petition for a writ of certiorari and will be considered in this brief:

1. Whether an action brought in a United States District Court under Section One of the Civil Rights Action of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State

of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.

2. Whether there is a doctrine of unqualified executive immunity which immunizes state officials from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, against the Governor of Ohio, Adjutant General of the Ohio National Guard, officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the outright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

In addition, the Court's recent decision in the related case of *Gilligan v. Morgan*, No. 71-1553, decided June 21, 1973, necessitates consideration of an additional issue, raised in Respondent Rhodes' brief.

4. Whether claims for money damages as a consequence of death caused by the Ohio National Guard against individuals claimed to be responsible, are rendered nonjusticiable by the Court's decision, in *Gilligan v. Morgan*, No. 71-1553, that the training, use and arming of National Guard troops is an inappropriate matter for federal injunctive relief.

Statement of the Case

On May 4, 1970, Petitioner's decedent and daughter, Sandra Lee Schener, was killed on the campus of Kent State University, Kent, Ohio, where she was a student, when a contingent of Ohio National Guard troops fired into a crowd of students and other young persons on the campus. All evidence in petitioner's possession indicates that the bullet which caused the death of petitioner's decedent was fired by a member of the Ohio National Guard and the complaint so alleges.¹

This action was filed on September 8, 1970 and charges several persons with specific acts or omissions which caused the death of petitioner's decedent. The complaint was dismissed by the district judge and, as a consequence, there has never been a factual record developed. Therefore, the statement of the case must be limited to summarizing the complaint's allegations.

The Allegations of the Complaint

The first claim in this action is based upon Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983. It alleges that the defendants acted in concert and subjected the plaintiff's decedent to a deprivation of rights, privileges and immunities secured by the United States Constitution, specifying that the plaintiff's decedent,

¹ 86a. The complaint, as well as the opinions of the courts below, are attached in an appendix to the Petition for a Writ of Certiorari and are not reprinted in a separate appendix. For the remainder of this brief references to the appendix to the petition will be made as ____a, and references to the separate appendix will be made as ____A.

when shot by Ohio National Guard troops, was deprived of life without due process of law.²

The defendants in this action were, at the time it was commenced, the Governor of Ohio, the Adjutant General of the Ohio National Guard and Assistant Adjutant General, three commissioned officers of the Ohio National Guard, unnamed officers and enlisted men of the Ohio National Guard,³ and the President of Kent State University. Following the conclusory allegation of deprivation of life without due process of law set forth above, the complaint proceeds to detail the charge as to each defendant with specific allegations of personal misconduct causally related to the death of plaintiff's decedent. Thus, Governor Rhodes is charged, *inter alia*, with ordering Ohio National Guard troops to break up lawful assemblies, permitting them to carry guns loaded with live ammunition and permitting them to shoot at persons without justification. Complaint, para. 13(a). Defendants Del Corso and Canterbury, Ohio National Guard Generals, are charged, *inter alia*, in addition to permitting the use of loaded guns and permitting unjustified shootings, with ordering inadequately trained and incapable troops to engage in conduct which greatly increased the risk of shooting of innocent persons. Complaint, para. 13(b) and (c).

Defendants Jones, Martin and Srp, Ohio National Guard Officers, are charged, in the alternative, with having or-

² 86a.

³ The caption describes "various officers and enlisted men" and, in Paragraph 7 of the complaint it is alleged that their names "are not now known to plaintiff" but that they "will be joined . . . as soon as their names become known . . ." On May 3, 1972, plaintiffs filed a successor complaint, treated as a new action. *Scheuer v. Rhodes, et al.* (N.D.O., E.D. No. C72-439, May 3, 1972), naming certain additional National Guardsmen.

dered troops to shoot at persons without legal justification or with having failed to restrain troops under their direct command from unlawful shootings. Complaint, para. 13(d). The unnamed National Guard troops and officers are charged, in substance, with having shot without legal justification or, in the alternative, pursuant to orders which were patently unlawful.

Finally, Defendant White is charged with reckless omission to act when his actions could have decreased the risk of shooting of innocent persons by the Ohio National Guard.

In addition to alleging the wrongful nature of the shooting, the complaint states that petitioner's decedent, "at the time she was shot . . . was neither engaged in a riot nor any other criminal or disruptive activity."⁴

The District Court's jurisdiction is premised, in the complaint, on the first claim, which, being based upon 42 U.S.C. Section 1983, confers jurisdiction under 28 U.S.C. Section 1343. The remaining claims set forth in the complaint are based upon state tort law and, falling under the doctrine of pendent jurisdiction, are dependent at this stage on the validity of the first claim.

The *ad damnum* clause prays for "compensatory damages against all defendants, jointly and severally, in the amount of One Million Dollars (\$1,000,000.00) and for punitive damages in an amount which this Court determines is just and proper . . ." No damages are sought from the State of Ohio, its treasury or its property. Moreover, there is no known mechanism under the law of Ohio by which a judgment against the defendants would entitle the plaintiff to execution of judgment against the State of Ohio, its treasury or its property.

⁴ Para. 10. 86a.

The Theory of the Complaint

The first claim, arising under 42 U.S.C. Section 1983, rests on the theory, long recognized by the case law in this Court and the lower federal courts, that an arbitrary and unjustified killing by state officials acting under color of their official positions constitutes a deprivation of life without due process of law in violation of the Fourteenth Amendment to the United States Constitution. See *Screws v. United States*, 325 U.S. 91 (1945). The Court recognized, in *Monroe v. Pape*, 365 U.S. 167, 187 (1961) that, unlike the criminal statute involved in *Screws, supra*, which punished "willful" deprivations of constitutional rights, 42 U.S.C. Section 1983 does not require proof of a specific intention to deprive of a constitutional right as a basis for liability. Lower Court cases, following *Monroe v. Pape, supra*, have treated cases of intentional infliction of injury, abuse of power or even some forms of negligence as sufficient for liability under 42 U.S.C. Section 1983. See, e.g. *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) rev'd on other grounds as to other defendant *sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). Consistently with such decisions, the first claim in this case alleges that the defendants acted either "intentionally, recklessly, willfully [or] . . . wantonly."⁵

It is likewise the theory of the complaint that, in addition to the person or persons who shot guns, persons who,

⁵ Para. 13. 87a.

acting under color of state law, intentionally, recklessly or even negligently establish the conditions or give the orders which lead to unjustified killings or injuries, are jointly liable to the same extent as the last actor. See especially *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) rev'd on other grounds as to other defendant, *sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973).

Proceedings Below

Motions to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., were filed in the District Court on behalf of all named defendants on the ground that the action, although nominally against them as individuals, was, in fact, against the State of Ohio. Defendant Rhodes likewise argued that, as a matter of law, his conduct, even if unlawful, was not the proximate cause of petitioner's decedent's death.^{*} No factual matter was offered by the defendants in support of the motions other than copies of proclamations by the Governor of Ohio activating the Ohio National Guard and recording the fact of their having been ordered to active duty in Kent.[†]

The motions to dismiss in this case, and in *Krause v. Rhodes* and *Miller v. Rhodes* (No. 72-1318 in this Court), all came before District Judge Connell for decision. Judge Connell granted all of the motions, concluding that, although the complaints named individuals as defendants,

^{*} See Motion to Dismiss of Defendant Rhodes. 8A.

[†] 23a, 25a.

the suits were in fact against the State of Ohio and, as a result, prohibited by the Eleventh Amendment to the United States Constitution.*

Although Judge Connell nominally placed his decision on a purely jurisdictional ground, portions of his opinion read as findings of fact, despite the absence of a factual record before him. His opinion includes the conclusion that,

"The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it."*

Appeal was taken to the United States Court of Appeals for the Sixth Circuit, and this case was again considered together with *Krause v. Rhodes* and *Miller v. Rhodes*. In writing the Court's opinion affirming dismissal of the complaint, Judge Weick, in addition to upholding dismissal under the Eleventh Amendment, held that "the Governor, the officers of the Guard, and the President of Kent State University all have executive immunity."¹⁰

Judge O'Sullivan wrote a separate, concurring opinion in which he concluded, on the basis of judicial notice, that the complaints were "contrived to hide rather than disclose

* 82a.

* 80a.

¹⁰ 20a.

the true background of the involved events."¹¹ He apparently misread the claim against Governor Rhodes as being limited to liability for sending in the National Guard and characterized the Governor's conduct as required by his office.¹²

Judge Celebrezze dissented.

ARGUMENT

Introduction

Since the claim underlying the third question presented does not attack a ground formally relied upon below but rather relates to the courts' methodology as a ground for granting review, it will be dealt with first, followed by consideration of the first and second questions presented, and then the fourth.

Summary of Argument

The lower courts, adopting a peculiar view of the facts, refused to accept the pleaded facts as true. At this point, the Court's decision must be based upon the facts pleaded.

The Eleventh Amendment has never been thought to have any bearing on damage actions against government officials charging personal wrongdoing and aimed at their personal assets. Even if it had been, the holding of *Ex parte Young*, 209 U.S. 123 (1908) that a shield of official immunity is removed when the public official acts in violation of the

¹¹ 30a-31a.

¹² *Ibid.*

Constitution precludes application of the Eleventh Amendment. If the Eleventh Amendment were interpreted to bar suit here, it would be in conflict with the Fourteenth Amendment and Section One of the Civil Rights Act of 1871 and would fall for that reason. Moreover, the requirement of a constitutional remedy created in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) mandates an interpretation opening the federal courts where, as here, the State in question has closed its courts to suit against government officers.

A doctrine of personal immunity from suit is inconsistent with the goals of the Civil Rights Act and has, by and large, been rejected. Precedents in this Court adopting other forms of immunity do not extend to executive officers except in the defamation area, and the change from a no-fault to a fault principle there has made its continuation even in that area untenable.

No special immunity arises from the fact that one of the defendants was the Governor at the time in question and called out troops in a declaration of "disorder" (25a), nor does the Court's recent decision in *Gilligan v. Morgan*, 41 U.S.L.W. 4966 (1973), precluding injunctive relief on the same facts, bar damages here.

I.

The Court's decision on the merits must be made on the allegations of the complaint, liberally construed.

As was noted above, two of the judges who voted against petitioner's position below grounded their decisions on points of law but "found" facts not in the record. Their action, however, is inconsistent with the Federal Rules of Civil Procedure, and, in resolving the merits, this Court should limit itself to the face of the complaint.

It has long been the rule that the allegations of a complaint in federal court must be taken as true for purposes of a motion to dismiss, must be construed liberally in favor of the pleader at that stage, and the complaint may not be dismissed "unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); Rule 8(f), Fed. R. Civ. P. See also *Cruz v. Beto*, 405 U.S. 319, 323 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 423-424 (1969); *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965); 2A J. W. Moore, Federal Practice ¶12.08 at pp. 2265-67. The rules just cited reflect the important policy conclusions that one who pleads facts stating a claim for relief is entitled to a day in court and that disputed, or disbelieved, facts are not to be resolved against the pleader until he has failed in proof or has failed to appropriately rebut sworn material which turns a "speaking motion" into a motion for summary judgment. 2A J. W. Moore, Federal Practice ¶12.09. That is so even if the motion to dismiss

is cast in terms of a motion under 12(b)(1) directed to the subject matter jurisdiction of the Court. *Id.* at ¶12.16, p. 2352. If such a motion involves disputed factual issues, the court must hold a preliminary, evidentiary hearing to resolve the issue of jurisdiction, see, e.g., *Sanial v. Bos-soreale*, 279 F. Supp. 940 (S.D.N.Y. 1967), unless resolution of the jurisdictional issue is tantamount to resolution of the merits, in which case the motion is to be deferred to trial on the merits. See, e.g., *Smith v. Sperling*, 354 U.S. 91 (1957); *United States v. Cigarette Merchandisers' Association*, 18 F.R.D. 497 (S.D.N.Y. 1955).

The present case is an unusual one in that it arises from a major historical event which received great publicity, polarized public opinion and produced conflicting reports from several official sources. See *Hammond v. Brown*, 323 F. Supp. 362 (N.D. Ohio 1971), *aff'd*, 450 F.2d 480 (6th Cir. 1971); *King v. Jones*, 319 F. Supp. 653 (N.D. Ohio 1971), *rev'd* 450 F.2d 478 (6th Cir. 1971), judgment of Court of Appeals vacated and remanded to District Court for dismissal on mootness grounds, 405 U.S. 911 (1972). Many of the factual matters are explored at greater length in the briefs of *amici curiae*. It is clear, however, that two of the key factual issues raised by the complaint—whether the Ohio National Guard troops were justified in shooting in the direction of civilians and whether the conditions leading to that shooting were laid by the misconduct of the defendants—were also issues that have drawn much discussion in the press, especially in Ohio.

With that backdrop, the district judge, and at least one of the Court of Appeals judges, obviously got caught up in the passion of the events and accepted an unproved version of the events which was inconsistent with the pleadings.

The district judge "found" that Respondent Rhodes, then the Governor of Ohio, acted "in good faith" (80a). Judge O'Sullivan seems to have concluded that, despite pleadings to the contrary, the entire course of action followed by the defendants was fully warranted by the circumstances (30a).

At this point, such premature factual judgments have already worked a hardship on petitioner to the extent that they contributed to the dismissal and, therefore, delayed trial of the action. The only effective remedy at this point, however, would be for this Court to deal with the legal issues as raised by the pleaded facts, rather than on the basis of the findings below.

Moreover, the suggestion, made for the first time in the brief of Respondent Rhodes in opposition to the petition for a writ of certiorari (at pp. 7-8) that attachment of two gubernatorial proclamations to the motion to dismiss made that motion a "speaking" motion for summary judgment is untenable. There are no sworn facts set forth in such proclamations. (They are at 23a.) In fact, they do no more than memorialize the fact that the Governor ordered units of the militia to duty in and around Kent State University to maintain peace and order. They do not purport to establish any material facts which could affect the outcome of this suit, such as the existence of an insurrection, nor could they.

II.

The Eleventh Amendment to the United States Constitution does not bar suit in federal court against individuals for damages.

The striking thing about the decision of the Courts below that the Eleventh Amendment to the Constitution precludes maintenance of this action in federal court is its novelty. In the context of a damage action against the personal assets of state officers, such a claim has rarely been discussed in the cases and finds no support in precedent.

The substance of the Eleventh Amendment argument, as set forth in Judge Weick's opinion for the Court below, is that, since the conduct of state officials, in performing their official functions might be affected by the fear of liability for injuries caused by their conduct, the State, through them, would be affected. The reasoning follows, then, that a suit which affects the State is actually a suit against the State.

Taken to its logical extreme, the argument would work a total repeal of the Civil Rights Act, and, indeed, would immunize state officials from suit in federal court on many other bases, such as diversity jurisdiction. For that reason alone, it cannot be given credence.

This Court has, in the past, explicitly recognized that the Eleventh Amendment has no real role to play in suits seeking damages from persons who also happen to be state officials. See, e.g., *Ford Motor Company v. Treasury Department of Indiana*, 323 U.S. 459 (1944); *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 50-51 (1944). The clearest

statement of that proposition came in the opinion of Justice Reed, for a unanimous Court, in the first of the cases just cited in which he wrote,

"Where relief is sought under general law from wrongful acts of State officials, the sovereign immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally" (citations omitted), 323 U.S. at 462.

Moreover, the distinction between suit against an individual governmental officer for personal damages and suit against governmental entities for damages from the public treasury as a consequence of governmental officers' misconduct has recently been adhered to by the Court in the highly analogous area of suits against municipalities. See *Moor v. County of Alameda*, 41 U.S.L.W. 4627 (1973). See also *Monroe v. Pape*, 365 U.S. 167 (1961). Cf. *City of Kenosha v. Bruno*, 41 U.S.L.W. 4819 (1973). Indeed, the decision in *Monroe v. Pape*, 365 U.S. 167 (1961) upholding damage actions under the Civil Rights Act is dependent upon rejection of the Eleventh Amendment argument accepted by the Court below. Suit for money damages under 42 U.S.C. Section 1983 is, under *Monroe*, possible for abuse of office only because the holding of governmental office—State or local—is necessary to supply the "State action" turning conduct which is otherwise merely tortious under state law into a deprivation of a constitutional right. See also *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941). If the very "state action" which created the federal right to relief under Section

1983 were to be the basis for rejection of a federal remedy, the *Monroe* decision would effectively be a nullity. That is especially so since both the opinion of the Court and the separate concurring opinion of Justice Harlan recognize that it was the purpose of the Congress, in adopting Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983 not merely to create a federal right but to afford a federal judicial remedy as an alternative to the state-court remedy. See also *District of Columbia v. Carter*, 409 U.S. 418, 425-429 (1973).¹² Thus, *Monroe v. Pape* must be read as rejecting a jurisdictional bar of any kind to suit against individuals for damages.

Moreover, such a conclusion is in full harmony with the traditional understanding of damage suits against governmental officers. That understanding was that, while sovereign immunity protected the State, it did not protect its employees. Harper & James summarize the tradition as follows:

The Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers. It was the boast of

¹² This is especially clear from the original text of the Act, which combined both the substantive and jurisdictional provisions.

In its original form, Section One of the Civil Rights Act of April 20, 1871 provided, in relevant part:

... any person ... shall ... be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal review upon error and, other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, 1866 ... ; and the other remedial laws of the United States which are in their nature applicable in such cases. 17 Stat. 13.

Subsequent codifications have separated the statute into two sections, 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343.

Dicey, often quoted, that "[w]ith us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act without legal justification as any other citizen." 2 F. Harper & F. James, *The Law of Torts* 1632-33 (1956) (footnotes omitted).

The State, however, was traditionally immune from suit without its consent. It was that immunity which the Congress, in proposing adoption of the Eleventh Amendment, sought to protect from abrogation by unconsented federal Court suit. See, e.g., *Employees of Dep't of Public Health and Welfare of Missouri v. Dep't of Public Health and Welfare of Missouri*, 41 U.S.L.W. 4493 (1973); *Hans v. Louisiana*, 134 U.S. 1 (1890); Jacobs, *The Eleventh Amendment and Sovereign Immunity* 109-110 (1972).

Since there was no purpose to protect a non-existent personal immunity, it is logical that the Eleventh Amendment makes no mention of restricting federal Court jurisdiction over individuals. It is simply limited to overruling the proposition, established temporarily in *Chisholm v. Georgia*, 4 Dall. 419 (1793), that the State's immunity from unconsented suit was rendered unavailable when the plaintiff could lodge jurisdiction in federal Court.

That the foregoing, limited, interpretation was the one generally attached to the Eleventh Amendment at the time the Civil Rights Act of 1871 was adopted is reflected in the remarks of various members of Congress at the time. Representative Kerr, for example, made the following statement:

"I hold that the constitutional power of the Federal Government to punish the citizens of the United

States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States . . ." Cong. Globe, 42d Cong., 1st Sess. 788 (1871).

Thus, it can fairly be said that the Eleventh Amendment has nothing to do with damage suits against public officials, and was never understood to have any bearing on such suits. In the area of damages, the Eleventh Amendment is limited in its applicability to efforts to directly execute on the public treasury, see, e.g., *Parden v. Terminal R. Co.*, 377 U.S. 184, 192 (1964) or to get at public moneys or property by nominal suit against individual officers who, pursuant to State law, are a conduit for release of State moneys. See, e.g., *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944); *Great Northern Ins. Co. v. Read*, 322 U.S. 47 (1944). See also *Re New York*, 256 U.S. 490 (1921).

Moreover, even if the Court were to consider the case a closer one and accept the view that damage suits against State officials were no different in status from suits for injunctive relief, the Eleventh Amendment would not bar suit.¹⁴ That result necessarily follows from *Ex Parte Young*, 209 U.S. 123 (1908), one of the cornerstones of American constitutional jurisprudence, which established the rule that suit against an individual governmental officer is not, within the meaning of the Eleventh Amendment, a

¹⁴ Clearly, injunction suits against government officers are a much more direct, and severe, interference with states' sovereignty than damage suits against such persons.

suit against the State. See 3 K. Davis, *Administrative Law* §27.03 at 553. *Ex parte Young* has been "consistently followed to the present day." See *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). It is therefore worth examination.

Young was the Attorney General of Minnesota and was charged with enforcing compliance with rate schedules ordered by the State Railroad Commission. Shareholders of railroads subject to the tariff reductions ordered by the Commission brought an action in the Federal Circuit Court seeking injunctive relief, based, *inter alia*, on the unconstitutionality of the Commission's orders and statute. The federal Court issued a preliminary injunction restraining *Young* from taking any steps to enforce the remedies or penalties of the statute. He was then held in contempt for violating the order.

A habeas corpus petition filed in the Supreme Court was premised on the settled rule that the Federal Circuit Court's order of contempt was invalid if the Court lacked jurisdiction to act in the main case. *Young* argued that jurisdiction was lacking under the Eleventh Amendment, because the suit affected the government of the State and was in effect one against the State of Minnesota. 209 U.S. 143. In support of the contempt, it was argued that, to the extent that enforcement of state law violated the Fourteenth Amendment to the United States Constitution, that Amendment limited the effect of the Eleventh. 209 U.S. 150. The Supreme Court, however, following a solid line of decisions running back to *Osborn v. United States Bank*, 9 Wheat. 738, 846, 857 (1824) held that the action was not one against the State of Minnesota. The Court reiterated

and confirmed the settled rule that an individual officer, acting in violation of the federal constitution, could not be treated as the State or as acting for the State. 209 U.S. 159. Even the first Justice Harlan, who dissented on the injunction aspect of the case and rejected the fiction that the State was not affected, conceded that suits against individual officers of the State, charged with personal wrongs, were not suits against the State. 209 U.S. 189.

Thus, in 1908, the Supreme Court settled the law that a suit not naming the State as a party, which charges individual wrongdoing or deprivation of constitutional rights, is not a suit against the State.

This Court, and the lower courts have continued to recognize the viability of the "fiction" created by *Ex parte Young*. See, e.g., *Employees of Dep't of Public Health & Welfare of Missouri v. Dep't of Public Health and Welfare of Missouri*, 41 U.S.L.W. 4493, 4498, n. 9 (1973) (concurring opinion of Marshall and Stewart, JJ.) ("Of course, suits brought in federal court against State officers allegedly acting unconstitutionally present a different question [from suits against State agencies]."); *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971) (*en banc*); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Board of Trustees of Arkansas A & M College v. Davis*, 396 F.2d 730 (8th Cir.), cert. denied 89 Sup. Ct. 401 (1968); *Bayer v. Chaloux*, 288 F. Supp. 366 (N.D.N.Y. 1968). See also *Neal v. Georgia*, 469 F.2d 446 (5th Cir. 1972).

Furthermore, even if one were to argue that *Ex parte Young* has lost its viability or is based upon an untenable fiction and suit against state officials for conduct arising from their official positions was, because of its effect, suit against the State, that would not end the matter. In fact,

however suit against individuals for money or injunctions is characterized for Eleventh Amendment purposes, there is no question that the Congress, in 1871, intended to create both liability and federal jurisdiction for such suits. That intention is clear from the text, see footnote 13, *supra*, and the legislative history, as summarized in *Moor v. Alameda County*, 41 U.S.L.W. 4627 (1973); *City of Kenosha v. Bruno*, 41 U.S.L.W. 4819 (1973); *District of Columbia v. Carter*, 409 U.S. 418 (1973) and *Monroe v. Pape*, 365 U.S. 167 (1961).

If the Eleventh Amendment were interpreted as precluding suits against State officers, absent consent of the State, in federal Court, the Court would have to decide whether the intention of Congress should nevertheless be given effect. In a recent decision, a majority of the Court has reiterated the position, earlier established in *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), that Congress, when acting within its legitimate substantive powers, can impose federal court jurisdiction on a "State" despite the Eleventh Amendment. *Employees of Dep't of Public Health and Welfare of Missouri v. Dep't of Public Health and Welfare of Missouri*, 41 U.S.L.W. 4493 (1973).¹⁵

¹⁵ Justice Douglas wrote the majority opinion for himself, the Chief Justice and Justices White, Blackmun, Powell and Rehnquist. The only dissent from this position came in the concurring opinion of Justices Marshall and Stewart, who argued that the Congress could not enlarge on a specific restriction on Article III of the Constitution and that the Eleventh Amendment was such a restriction. 41 U.S.L.W. at 4496-4499. Justice Brennan dissented from the majority opinion, 41 U.S.L.W. 4499, but likewise rejected the view that the Eleventh Amendment is a constitutional limitation on federal judicial power. 41 U.S.L.W. 4503. Moreover, his reading of *Hans v. Louisiana*, 134 U.S. 1 (1890) as not precluding suit against a state by its own residents would result in non-application of any interpretation of the Eleventh Amendment to this action, brought by an Ohio resident against Ohio officials.

Here, of course, the legislative power of Congress to act was supplied by Section Five of the Fourteenth Amendment, which provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Thus, even if the Fourteenth Amendment would not itself abrogate an interpretation of the Eleventh Amendment which closed the federal courts to suit against State officers, the Congress had the power to do so, see, e.g., *Katsenbach v. Morgan*, 384 U.S. 641 (1966), and, in fact, intended to do so.

Additionally, an interpretation of the Eleventh Amendment which closed the federal courts to suits such as the present one, and an interpretation of the Fourteenth Amendment or 42 U.S.C. Section 1983 which did not open them would still not foreclose the matter. Rather, jurisdiction of the federal courts over actions such as this one would independently be required by the decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens*, of course, held that the Constitution—in that case the Fourth Amendment—gave rise to a right to damages caused by its violation even in the absence of enabling legislation. The Court has recently noted that the *Bivens* remedy is likewise applicable in suits, analogous to this one, charging misuse of governmental force. *District of Columbia v. Carter*, 409 U.S. 418, 432-433 (1973).¹⁴

¹⁴ In holding that 42 U.S.C. Section 1983 was not applicable to the District of Columbia, the Court stated:

"This is not to say, of course, that a claim, such as a possible claim against officer Carlson, of alleged deprivation of constitutional rights, is not litigable in the federal courts of the District [citing *Bivens*]." 409 U.S. 432-433.

If, following *Bivens*, the Constitution gives rise to a remedy for abuse, it does so for the reasons set forth in the *Bivens* decision. Those are that reliance on the often conflicting rules of tort law existing from State to State would, at worst, provide for nullification of remedies according to local views and, at best, would provide for different capabilities to effect such rights from State to State. See especially concurring opinion of Harlan, J., 403 U.S. at 400.

Thus, *Bivens* must be read as compelling the holding that the due process clause of the Fourteenth Amendment compels a remedy of damages for violation. If the federal courts are closed to such suits, however, the individual citizen's right to relief is dependent upon whether the courts of the State in question are open to suit of that character. For, persons injured by Ohio governmental officials, relief would not be possible because the State Supreme Court has consistently held that the local courts are without jurisdiction to hear suits against the State, see, e.g., *Krause v. Ohio*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E.2d 475 (1959); *Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1917), and that suit against an individual State officer, acting in his official capacity, is a suit against the State. See, e.g., *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947). As a result, in Ohio, a conclusion that a provision of the United States Constitution required a damage remedy would be meaningless unless the Court were also to hold that included in that remedy, by interpretation, is a restriction on the operation of any broadened interpretation of the

Eleventh Amendment to exclude its applicability when a constitutional remedy is being asserted.¹⁷

It would thus take a wholesale repudiation of years of constitutional history and the overruling of several recent decisions for this Court to affirm the decision below. Such a slaughter of precedent, however, would not be supported by sound policy but, on the contrary, would be running against a tide of opinion which holds that sovereign immunity "runs counter to prevailing notions of reason and justice." *Larson v. Domestic and Foreign Corporation*, 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting). See, e.g., Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963); Borchard, *Governmental Liability in Tort*, 34 Yale L. J. 1, 129, 229, 757, 1039 (1926). The Eleventh Amendment, as a codification of concepts of sovereign immunity, should not be expanded into new ground when its *raison d'être* has itself been repudiated.

¹⁷ There is one other respect in which *Bivens* compels reversal here. If suit against a state official is suit against a state because it interferes with the operation of state government, then, logically, suit against a federal officer, for parallel reasons, must be a suit against the federal government. But suit against the federal government is barred by federal sovereign immunity unless consented to by Congress. See, e.g., *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949); *Dugan v. Rank*, 372 U.S. 609 (1963). The Federal Tort Claims Act contains no waiver of immunity for intentional torts, or constitutional deprivations of the kind involved in *Bivens*. See 28 U.S.C. Sections 1346, 2674 and 2680. As a result, *Bivens* must be read to hold that suit against officers is not suit against the government, and *Stare Decisis* applies to this action.

III.

The individual defendants sued in this action have no personal immunity from suit for the wrongs alleged in the complaint.

The alternative ground of decision adopted by the Court of Appeals—that all of the defendants in this suit had an absolute, executive immunity from suit by virtue of their official positions—is different from the Eleventh Amendment contention in that it deals with substantive immunity rather than the Court's jurisdiction. It is also true that it is not so totally devoid of support as the jurisdictional argument. The practical effect of its acceptance, however, would be parallel to acceptance of the Eleventh Amendment position in this suit; it would work a *pro tanto* repeal of that provision of 42 U.S.C. Section 1983 which specifically authorizes liability "to the party injured in an action at law," i.e., money damages from the wrongdoer. Moreover, it reflects a profound policy conclusion which this Court should not embrace. That conclusion is that, *in all circumstances*, affording governmental officials freedom from the restraint of potential liability for misconduct of even the worst kind in office is a higher value than the value or interest of individuals sought to be protected by the substantive provision of the Constitution opposed to it. In this case, to uphold the Court of Appeals' decision, the Court must categorize the individual's interest in not being deprived of life without due process of law as of lesser importance than the freedom of government officials to act without restraint. If it does so, the Court will erect a value judgment over the framers of the Constitution,

who chose to erect the right to be free of arbitrary taking of life as part of the Fifth and Fourteenth Amendments and nowhere mentioned officials' freedom from suit as one of the inviolate tenets of our governmental system.

The claim that there is an executive immunity to suit for constitutional deprivations, although not definitively dealt with by this Court, has been rejected by the great majority of lower courts which have considered the issue. See, e.g., *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), rev'd on other grounds as to other party, 409 U.S. 418 (1973); *Jobson v. Heine*, 355 F.2d 129 (2d Cir. 1965); *Birnbaum v. Trussell*, 347 F.2d 86 (2d Cir. 1965); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968). By and large, the courts have rejected immunity for the reasons set forth in Judge Hays' opinion for the Second Circuit in *Birnbaum*, *supra*,

"A showing that defendants acted within the scope of their employment and authority is not sufficient to defeat the district court's jurisdiction. It would nullify the whole purpose of the civil rights statute to permit all government officers to resort to the doctrine of official immunity. The statutory condition of defendants acting under color of state or territorial law contemplates that he act in an official capacity. To the extent that state or municipal officers, such as defendants Trussell and Mangum, violate or conspire to violate constitutional and federal rights, the Civil Rights Laws §§1979 and 1980 (3), 42 USC §1983 and 1985 (3), abrogate the doctrine of official immunity.

See The Doctrine of Official Immunity Under the Civil Rights Act, 68 Harv. L. Rev. 1229 (1955)." 347 F.2d at 88-89.

Moreover, such courts have soundly rejected application of executive immunity to Civil Rights Act suits despite the existence of respectable precedent supporting executive immunity for some common law torts, see, e.g., *Barr v. Mateo*, 360 U.S. 564 (1959); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), and for legislative, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and judicial, *Pierson v. Ray*, 386 U.S. 547 (1967), immunity to Civil Rights Act suit.¹⁸

The *Tenney* decision forms no serious precedent for executive immunity to a charge of deprivation of constitutionally secured right. While the Constitution is totally silent on the subject of executive immunity, legislative immunity from suit for acts committed pursuant to legislative office is specifically granted by the Constitution. The Speech and Debate clause, Art. I, §6, cl. 1¹⁹ was adopted, as an immunity, for the express purpose of protecting the legislative from the executive branch of government, had long antecedents, and has long been interpreted by the Court as a total and absolute immunity for acts within the scope of legislative office. See, e.g., *Doe v. McMillan*, 41 U.S.L.W. 4752 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501

¹⁸ The only respectable precedential support for immunity of executives to Civil Rights Act suit is the opinion of Judge Medina on the remand in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). The limits of the *Bivens* precedent will be discussed below.

¹⁹ "... for any Speech or Debate in either House they [the Senators and Representatives] shall not be questioned in any other place."

(1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967). Justice Frankfurter's opinion for the Court in *Tenney* makes it clear that legislative immunity was "taken as a matter of course by those who severed the Colonies from the Crown and founded our nation," 341 U.S. at 372, and was understood, as evidenced by parallel state constitutional provisions, as applying both to the federal and state legislatures.²⁰ Legislative immunity is thus unique, historically recognized and stands on its own, separate from other immunities.

The Court has likewise recognized the validity of judicial immunity under 42 U.S.C. Section 1983 but, here too, the precedents read against, rather than in favor of, executive immunity. The Court, in *Monroe v. Pape*, 365 U.S. 167, 187 (1961) recognized that what the 1871 Congress intended, in creating a "constitutional tort" was for the new principle of liability to be read against the background of tort law in existence at the time. For reasons parallel to those behind legislative immunity, judges had historically been granted immunity from tort liability at common law. That traditional understanding was solidified by this Court in *Bradley v. Fisher*, 13 Wall. 335 (1872) in which Justice Field traced the solid historical precedents for the immunity. This Court's extension of the immunity to actions charging deprivation of constitutional rights, rather than mere torts, is thus explainable by reference to the common law tradition, and incorporation of some traditional tort principles in Section 1983 in *Monroe*. See *Pier-son v. Ray*, 386 U.S. 547 (1967). In an opinion closely pre-dating *Pier-son*, the Third Circuit explained the exis-

²⁰ The applicability, by analogy, of the speech and debate immunity to state legislatures was apparently assumed by the Court in *Doe*. See, e.g., 41 U.S.L.W. 4756 n. 13.

tence of judicial immunity to Section 1983 suit as a consequence of the normal rule of statutory construction that, absent clear legislative intent to the contrary, statutes are not to be read in derogation of the common law at the time of their enactment. *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966).

Neither of the theories would support inclusion of executive immunity in Section 1983. Executive immunity had no common law recognition in the United States. See, e.g., 2 F. Harper and F. James, *The Law of Torts* 1632-1633 (1956). The first case in this Court recognizing an executive immunity was *Spalding v. Vilas*, 161 U.S. 483 (1896), an action charging the Postmaster General with causing injury by an *ultra vires* act. The opinion of the Court, however, was made of whole cloth. The only American precedents cited were judicial immunity cases. Only two cases were cited which supported executive immunity, both were English and both, importantly, were defamation cases. The *Spalding* opinion demonstrates that there was no American precedent for executive immunity prior to 1896 and, therefore, that the argument that incorporation was either intended by the 1871 Congress, assumed by it or had to be engrafted on Section 1983 by canons of statutory construction is unsupportable. This is borne out by the legislative debates in 1871, which are devoid of support for an executive immunity.

The legislative and judicial immunity precedents discussed above make one further significant point. The immunities were created and perpetuated to protect the legislative and judicial branches *from the executive, not the citizenry*.

Another argument for the extension of executive immunity to the suit at bar has been the decision in *Barr v.*

Mateo, 360 U.S. 564 (1959), a defamation case. *Barr*, of course, has no direct bearing, since it creates a tort immunity, not a Civil Rights Act immunity.²¹ Moreover, there was in fact no majority opinion in *Barr*. Justice Harlan wrote for himself and three other members of the

²¹ This point is of vital significance and has led to lower court holdings that, while official conduct which is both tortious and unconstitutional may be subject to a local law immunity to tort suit, it is not subject to immunity under Section 1983. See, e.g., *Roberts v. Williams*, 456 F.2d 819, and especially cases discussed at 830-831 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), rev'd on other grounds as to other party, 409 U.S. 418 (1973); *Chafin v. Pratt*, 358 F.2d 349 (5th Cir. 1966).

Indeed, Justice Harlan, the writer of the plurality opinion in *Barr*, has twice recognized that constitutional deprivations may be different in kind, and more serious than mere torts and that, therefore, a federal remedy is warranted without the limitations of state tort remedies. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 409 (1971); *Monroe v. Pape*, 365 U.S. 167, 195 (1961) (concurring opinions of Harlan, J.). Such a distinction is consistent with some of the original reasons behind adoption of Section 1983, which were that the state legal structure in parts of the country was suspect of failure to protect individual rights. See, e.g., *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Monroe v. Pape*, *supra*.

Likewise, the opinion of Judge Hand for the Second Circuit in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) on which heavy reliance was placed below recognizes the distinction between tort immunity and Civil Rights Act immunity. *Gregoire* was a suit against the Attorney General of the United States and others for false arrest, and the court's immunity discussion relates strictly to that cause of action. A second cause of action was pleaded under 42 U.S.C. Section 1983 (actually its predecessor, Section 43 of Title 8, U.S.C.), but it was not well taken, since the Attorney General, being a federal officer did not act "under color of state law." The plaintiff, arguing in opposition to immunity, had relied on *Picking v. Pennsylvania B.E. Co.*, 151 F.2d 240 (3rd Cir. 1947). Judge Hand wrote:

"The decision on which the plaintiff relies indeed holds that the doctrine of absolute immunity for official acts does not cover claims arising under § 43 of the Civil Rights Act; but it is not in point because, as we have just said, the case at bar is not within that section."

Court. Justice Black supplied the fifth vote in an opinion in which, noting that the suit was for libel against a public officer for release of information of public interest, he refused to read the District of Columbia libel laws to cover such conduct and suggested that, if he did, he would have to face the question of whether the libel laws violated the First Amendment, a question which he consistently answered in the affirmative thereafter. 360 U.S. at 577. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). He never embraced the immunity doctrine, nor did the four dissenters.

Of further significance, however, even Justice Harlan's *Barr* position reads in support of petitioner's case here. The significant feature of the law of defamation at the time of the *Barr* decision was that it was a species of liability without fault. If the Court were to reject the immunity argument in *Barr*, government officials contemplating release of information to the public, or to Congress, would have been faced with the risk of liability for publication of information without fault, i.e., when they were neither negligent as to the truth of statements made nor engaging in intentional falsification. Some restriction on liability was thus logical. Moreover, Justice Harlan's opposition to liability without fault was often stated, see, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 67 *et seq.* (1971) (concurring opinion) and it was in fact he who led the law to its present position requiring proof of fault in all defamation actions. *Ibid.* See also *Curtiss Pub. Co. v. Butts*, 388 U.S. 130, 160 (1967) (opinion of Harlan, J.) and especially *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 58 (1971) (opinion of White, J. summarizing state of defamation law). See also, Kalven, *The Reasonable Man and the First Amendment*, 1967 Sup. Ct. Rev. 267.

The *Barr* decision would have been unnecessary if the law of defamation in 1960 had been the same as the law of defamation in 1971. Moreover, the point is particularly pertinent to the issue of liability under Section 1983 because, following the incorporation of general principles of tort law in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), the lower courts have consistently held that *fault* is an absolute prerequisite to liability for deprivations of life or liberty without due process of law caused by the governmental infliction of physical injury. See, e.g., *Roberts v. Williams*, 456 F.2d 819 (5th Cir.) cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds as to other party, 409 U.S. 418 (1973); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Stringer v. Dülger*, 313 F.2d 536 (10th Cir. 1963); *Brasier v. Cherry*, 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961). Fault is, of course, alleged in this case.

In fact, in addition to there being an absence of precedent for absolute immunity under Section 1983, the one plausible argument in support, the need to protect public officers from liability when they are not in the wrong is inapposite.²²

Furthermore, even if there were an immunity from suit for official acts, there are severe limitations on that immunity which, under the allegations of the present complaint, may well be exceeded. As Judge Medina's opinion

²² This point is supported by that portion of *Pierson v. Ray*, 386 U.S. 547, 555 (1967) dealing with police officers in which the Court, noting a common law defense basically of non-faulty arrest, eschewed immunity. The relation of fault to immunity is also considered in the majority and concurring opinions of the D.C. Circuit in *Carter v. Carlson*, *supra*.

on remand in *Bivens*, *supra*, notes, even if there is an immunity for constitutional deprivations, it is only available to those who exercise discretionary, rather than ministerial, powers with respect to the subject matter of suit and, even then, only if the conduct occurred within the scope of office, 456 F.2d 1339 (2d Cir. 1972). Both "scope of office" and "discretionary function" are factual issues, *ibid.*, and cannot be resolved at the pleading stage. Compare *Walker v. Courier Journal and Louisville Times Co.*, 368 F.2d 189 (6th Cir. 1966) with *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966). See *Lasher v. Shafer*, 460 F.2d 343 (3rd Cir. 1972). Here, exceeding the scope of office was specifically pleaded (87a).

No view of the immunity issue could support the decision below.

IV.

The decision in *Gilligan v. Morgan* does not preclude the granting of damages at law for the claims raised by the complaint.

In *Gilligan v. Morgan*, 41 U.S.L.W. 4966 (1973) an injunction action arising from the same facts which gave rise to this suit, the Court, in reversing, held that the judicial remedy was not appropriate to control, by injunction, the way in which the National Guard troops are trained, armed or ordered in emergencies. In holding future control of the National Guard to be an executive and legislative, rather than judicial, function, the Court did not preclude the granting of damages for conduct which otherwise could not form the basis for injunctive relief. The Chief Justice wrote:

"It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard."

The limited nature of the *Gilligan v. Morgan* opinion was, of course, necessary to reconcile it with the precedents, which do not afford an immunity to governmental officers for damages merely because they acted during an emergency or because, in the case of the Governor, the troops were called out or an emergency was declared. The case most heavily relied on below—*Moyer v. Peabody*, 212 U.S. 78 (1909)—does not support the dismissal.

Moyer v. Peabody was an action for damages brought under Section 1983 against a former governor, adjutant general, and a captain in the National Guard. The Governor had ordered Moyer's arrest (212 U.S. at 82-83) because Moyer was a leader of a union whose members were believed to be the cause of rioting that was taking place (212 U.S. at 83, 84). The complaint alleged that Moyer was arrested, and imprisoned for two-and-a-half months, without probable cause. 212 U.S. at 82. It was further alleged that Moyer was not charged with any crime. *Id.* The Supreme Court assumed that a state of insurrection existed, 212 U.S. at 84, and that the former governor had acted in good faith, *id.*, since it was not alleged the Governor acted in bad faith. 212 U.S. at 85. It was in this context that the Court announced its rule:

So long as such arrests are made in good faith and in the honest belief that they are needed in order to

head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. 212 U.S. at 85.

For several reasons, *Moyer v. Peabody* does not support dismissal of the complaint. First, the Court did not give a governor complete and total immunity from liability. *Moyer v. Peabody* held only that a governor is not liable if he acts in good faith. Since the complaint in *Moyer v. Peabody* did not allege a lack of good faith, but merely a lack of probable cause, the Court ruled that dismissal of the complaint was proper. In the case at bar, unlike *Moyer v. Peabody*, the complaint alleges that former Governor Rhodes "intentionally, recklessly, wilfully and wantonly" engaged in conduct which caused decedent's death. Complaint, paras. 13(a), 15 (87a). These allegations clearly charge Respondent Rhodes with bad faith conduct, and thus even under *Moyer v. Peabody* are sufficient to state a cause of action. See *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968).

Second, the rule of *Moyer v. Peabody* is limited to situations of actual insurrection. As the Court subsequently explained, "[T]he general language of the opinion [in *Moyer v. Peabody*] must be taken in connection with the point actually decided." *Sterling v. Constantin*, 287 U.S. 378, 400 (1932). The "point actually decided" was that, in an insurrection (212 U.S. at 84), "the temporary detention of one believed to be a participant" (287 U.S. at 400) in the insurrection did not give rise to a cause of action for damages against the Governor. Absent an insurrection, then, the rule of *Moyer v. Peabody* is inapplicable. It declares no general immunity for wrongs committed by a governor.

Finally, in *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court overruled the premise of *Moyer* that a governor's determination of the need for use of force was unreviewable and makes the question of the legitimacy of his conduct a judicial one. *Accord, Faubus v. United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958) (injunctive relief granted against use of National Guard); *Wilson & Co. v. Freeman*, 179 F. Supp. 520 (D. Minn. 1959) (same); *Joyner v. Browning*, 30 F. Supp. 512 (W.D. Tenn. 1939) (same); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn. 1936) (same); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933) (same); *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935) (acts of governor subject to judicial review). See *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935) (denying relief, but stating acts of governor are reviewable); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn. 1934) (same). See also *Bishop v. Vandercock*, 228 Mich. 299, 200 N.W. 278 (1924) (narrowly interpreting statute to avoid immunity for negligent acts of National Guard troops and suggesting unconstitutionality if a contrary interpretation were made).

Nothing in the *Gilligan* decision disturbs the traditional American view that constitutional rights are not suspended by declaration of emergency, see, e.g., *Sterling v. Constantin*, 287 U.S. 378 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124-125 (1866), nor that liability for injuries caused is not precluded by the declaration of emergency. See, e.g., *Mitchell v. Clark*, 110 U.S. 633 (1884), and especially partial dissent of Field, *J.* at 640; *Bishop v. Vandercock*, *supra*, esp. 200 N.W. at 280; *O'Shea v. Stafford*, 122 La. 444, 47 So. 764 (1908). Actually, *Gilligan* points up the need for relief here.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

MICHAEL E. GELTNER

LEONARD J. SCHWARTZ

American Civil Liberties Union
of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF

JOEL M. GORA

American Civil Liberties Union
Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL

33 Public Square
Suite 210
Cleveland, Ohio 44113

Attorneys for Petitioner

Of Counsel:

STANLEY K. LAUGHLIN

NIKI Z. SCHWARTZ

MICHAEL S. HARSHMAN

American Civil Liberties Union
of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

WALTER S. HAFNER

1008 Standard Building
Cleveland, Ohio 44113

MOTION FILED

AUG 27 1973

LIBRARY
SUPREME COURT, U. S.

No. 72-1318

and

No. 72-914

in the
Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR KRAUSE, ADMINISTRATOR, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

ELAINE B. MILLER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

SARAH SCHEUER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE
AND

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS,
ON BEHALF OF

THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.,
THE UNION OF AMERICAN HEBREW CONGREGATIONS,
THE BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH,
AND THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A.,
AS AMICI CURIAE

DAVID E. ENGBAHL
4375 Butler Circle
Boulder, Colorado 80303
(303) 443-2211, ext. 6911

August, 1973

Attorney for Amici

No. 72-1318
and
No. 72-914

in the
Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR KRAUSE, ADMINISTRATOR, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

ELAINE B. MILLER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

SARAH SCHEUER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE**

The National Council of the Churches of Christ in the U.S.A.,
The Union of American Hebrew Congregations, The Board of
Church and Society of the United Methodist Church, and The

United Presbyterian Church in the U.S.A. hereby respectfully move for leave to file the attached brief *amicus curiae* in these cases. Oral consent of counsel for the Petitioners was obtained; but at the time of printing this motion written consent of the Respondents has not been secured, so that this motion for leave of court is necessary.

The National Council of the Churches of Christ in the U.S.A. is a national organization of religious groups which, among its other concerns, is devoted to the promotion of social justice and the advancement of due process of law. The issues at stake in the present review of these cases are of major importance to these concerns of the National Council of Churches, inasmuch as these issues are crucial to the legal enforceability of constitutionally secured human rights. With specific reference to the incident giving rise to these present cases, the General Board of the National Council of Churches on September 11, 1971, adopted a resolution urging that the Plaintiffs-Petitioners in these cases, and others aggrieved by that incident, "continue to seek a remedy in the civil courts." The interest of the National Council of Churches is not in any way related to the prayer for monetary damages; rather, the interest of the National Council of Churches is in enabling the American system of justice to proceed to a fair determination of responsibility and accountability for the deaths and injuries that occurred in the historic and unforgettable tragedy out of which these cases arose. Furthermore, the particular issues of law raised at this stage of these proceedings are crucial to the enforcement of civil rights and liberties also in other contexts, and therefore invoke the Council's broadest concerns for social justice in the United States.

The Union of American Hebrew Congregations is the central congregational body of Reform Judaism. Its membership consists of approximately seven hundred Reform Synagogues, comprising approximately one million persons throughout the United States. By virtue of its programs of religious action and social action, the Union of American Hebrew Congregations is dedicated to the application of religious ideals to the social problems of American life. The Union is concerned that the process of justice proceed fairly to an accounting for the

tragic event giving rise to these cases. In addition, the Union is concerned for the indispensable requisites of enforceability of civil rights and civil liberties, which are decisively tested by the issues in these cases.

The United Methodist Church is a religious body with approximately ten million five hundred thousand members in the United States. The Board of Church and Society is its national agency with responsibility for social witness to the Christian Gospel on a wide range of issues. Through its Department of Law, Justice and Community Relations, the Board of Church and Society of the United Methodist Church has been deeply involved in seeking justice in the wake of the shootings at Kent State University on May 4, 1970. Pursuant to this active and long-standing concern for establishing an accountability for the killing of four young people and the wounding of nine others on that day, the Board of Church and Society wishes to join as *amicus curiae* in these cases.

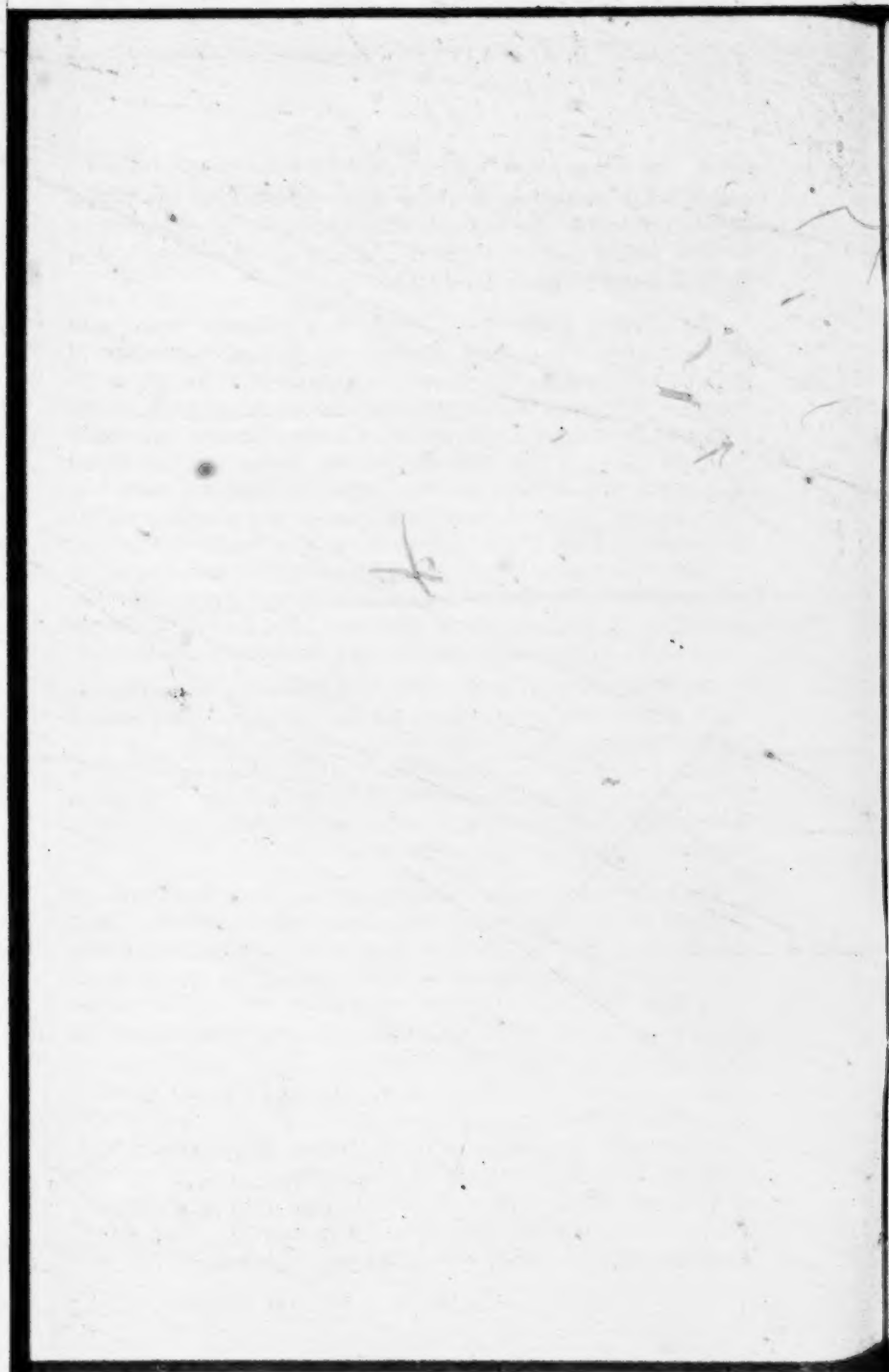
The United Presbyterian Church in the U.S.A. is a religious body with approximately three million members in the United States. Sharing, as a part of its religious conviction and Christian message, the concern for justice and the enforceability of legally protected human rights that has been articulated by the other *amici* herein, the United Presbyterian Church in the U.S.A. wishes to join in this brief.

Thus, representing the collective social conscience of several millions of religious Americans, these *amici* move the Court for leave to file the attached brief *amicus curiae*, supporting the position of Petitioners in these cases. It is the hope of *amici* that this unusual chorus of religious voices will emphasize the profound moral and constitutional significance of the issues presented for decision here.

Respectfully submitted,

DAVID E. ENGBAHL
4375 Butler Circle
Boulder, Colorado 80303
(303) 443-2211, ext. 6911
Attorney for Amici

August, 1973



No. 72-1318

and

No. 72-914

in the
Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR KRAUSE, ADMINISTRATOR, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

ELAINE B. MILLER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

SARAH SCHEUER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF

THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.,
THE UNION OF AMERICAN HEBREW CONGREGATIONS,
THE BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH,
AND THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A.,
AS AMICI CURIAE

DAVID E. ENGDAHL

4375 Butler Circle

Boulder, Colorado 80303

(303) 443-2211, ext. 6911

Attorney for Amici

August, 1973

INDEX

	Page
TABLE OF AUTHORITIES	viii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. FACTUAL CONTEXT OF THE ISSUES	3
II. LEGAL CONTEXT OF THE ISSUES	13
III. THE ISSUES FRAMED BY THE CERTIORARI PETITION	18
A. FACTUAL ASSUMPTIONS CONTRARY TO THE UNANSWERED COMPLAINTS ...	18
B. THE ELEVENTH AMENDMENT	19
C. PERSONAL PRIVILEGE OR IMMUNITY OF EXECUTIVE OFFICIALS	22
D. THE DIVERSITY CLAIMS IN KRAUSE AND MILLER	26
E. THE UNITED STATES NOT A NECESSARY PARTY	27
CONCLUSION	27

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
Barr v. Matteo, 360 U.S. 564 (1959)	23
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972)	23
Bivens v. Unknown Named Agents, 403 U.S. 388 (1971)	20, 21, 24
Chastleton v. Sinclair, 264 U.S. 543 (1924)	16
Constantin v. Smith, 57 F.2d 227 (E.D. Tex. 1932)	15
Dugan v. Rank, 372 U.S. 609 (1963)	19
Duncan v. Kahanamoku, 327 U.S. 304 (1946)	15
Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)	15
Ex parte Young, 209 U.S. 123 (1902)	20
Faubus v. United States, 254 F.2d 797, (8th Cir. 1958)	15
Gilligan v. Morgan, ____ U.S. ____, 93 S. Ct. 2440 (1973)	16, 27
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)	23
Griffin v. Wilcox, 21 Ind. 370 (1863)	23
Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935)	15
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949)	19
Milligan v. Hovey, 17 F. Cas. 380 (No. 9605) (C.C.D. Ind. 1871)	23
Mitchell v. Clark, 110 U.S. 633 (1884)	23
Moyer v. Peabody, 213 U.S. 78 (1909)	16, 24
Moyer v. Peabody, 148 Fed. 870 (C.C.D. Colo. 1906)	25

Cases (Continued)

	Page
Pierson v. Ray, 386 U.S. 547 (1967)	22, 23, 24
Poindexter v. Greenhow, 114 U.S. 270 (1885)	19, 20, 23
Reid v. Covert, 354 U.S. 1 (1956)	14
Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P.2d 582 (1933)	15
Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)	21
State of Ohio v. Coit, 8 Ohio Dec. 62 (C.P. 1897)	15
Sterling v. Constantin, 287 U.S. 378 (1932)	15, 16, 20, 24, 25, 26
United States v. Lee, 106 U.S. 196 (1882)	23
United States ex rel. Palmer v. Adams, 26 F.2d 141 (D. Colo. 1928)	15
United States v. Phillips, 33 F. Supp. 261 (N.D. Okla. 1940), vac., 312 U.S. 246	15
Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959)	15

Constitutions, Statutes and Rules

Fed. R. Civ. P. 8 (a) (2)	13
Fed. R. Civ. P. 8 (f)	13
Fed. R. Civ. P. 12 (b) (1)	18
Fed. R. Civ. P. 12 (b) (6)	18
Ohio Rev. Code § 5823.37 (Supp.)	27
18 U.S.C. § 241	12
18 U.S.C. § 242	12, 18
42 U.S.C. § 1983	18, 10, 21, 22, 26

Other Authorities

	Page
Comment, Constitutional Law — The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations, 59 Ky. L. J. 547 (1970)	16
Comment, Martial Law, 42 So. Cal. L. Rev. 546 (1969)	16
119 Cong. Rec. E207 <i>et seq.</i> (daily ed., Jan. 15, 1973)	8
119 Cong. Rec. H3615 (Daily ed., May 10, 1973)	17
8 Cyc. Fed. Pro. § 26.222	2, 8
Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 Colo. L. Rev. 1 (1972)	19, 20, 21, 22, 23
Engdahl, Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders, 57 Iowa L. Rev. 1 (1971)	16, 26
Law Revision Center, A Comprehensive Study of the Use of Military Troops in Civil Disorders, 43 Colo. L. Rev. 399 (1972)	16
Mutter, Some Observations on Military Involvement in Domestic Disorders, 29 Fed. B. J. 59 (1969)	16
Note, Constitutional Law—Martial Law, 75 W. Va. L. Rev. 143 (1973)	16
Note, Martial Law and the National Guard, 18 N. Y. L. F. 216 (1972)	16
Report of the President's Commission on Campus Unrest (1970)	4, 8
Wiener, Martial Law Today, 55 A.B.A.J. 723 (1969)	16, 24
5 Wright & Miller, Federal Practice & Procedure	18

No. 72-1318
and
No. 72-914

in the
Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR KRAUSE, ADMINISTRATOR, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

ELAINE B. MILLER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

SARAH SCHEUER, ADMINISTRATRIX, *Petitioner*

v.

JAMES RHODES, et al., *Respondents*

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF

THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.,
THE UNION OF AMERICAN HEBREW CONGREGATIONS,
THE BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH,
AND THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A.,
AS AMICI CURIAE

STATEMENT OF INTEREST
OF AMICI CURIAE

The interests of the several *amici* in this litigation are set forth in the Motion for Leave to File, bound together with this brief, at page i *supra*.

The arguments of *amicl* in this brief support the position of Petitioners in the three cases: Arthur Krause, Elaine B. Miller, and Sarah Scheuer.

SUMMARY OF ARGUMENT

Because of the remarkable behavior of the courts below in disregarding the allegations of the unanswered complaints, postulating factual premises of their own contrivance, and charging the plaintiffs' lawyers with deliberate attempts at deception, justice in this review proceeding requires a careful review of what is judicially noticeable concerning the events giving rise to these complaints. Part I of this brief is an orderly recapitulation of such judicially noticeable facts as reported in official government documents.

Because the causes of action stated in plaintiffs' complaints depend in part upon important propositions of constitutional law which have sometimes been the subject of confusion and disagreement, it is necessary to clarify and document these propositions in order for the character of plaintiffs' claims to be fully understood. Part II of this brief explains how the complaints invoke these constitutional propositions, and documents the propositions by reference to numerous cases and other authorities.

Only in the context of the factual and constitutional setting thus disclosed can the specific issues framed by the certiorari petitions be perceived in their full and profound significance. Part III of this brief examines those issues and argues that: (A) The courts below improperly assumed facts contrary to the unanswered complaints; (B) In holding the eleventh amendment a bar to these actions the courts below flew in the face of consistent and vigorous contrary rulings by this Court; (C) In creating an absolute personal privilege or immunity for unconstitutional acts of executive officials the Court of Appeals departed from precedent and destroyed an indispensable safeguard of constitutional rights; (D) The Courts below improperly ignored the diversity claims of plaintiffs Krause and Miller; and (E) The United States is not a necessary party in this litigation.

ARGUMENT

I. FACTUAL CONTEXT OF THE ISSUES

These cases were dismissed by the District Court before any answer had been filed. There has been no trial of the facts. Ordinarily a reviewing court would therefore judge the facts, at this stage, from the allegations of the complaints. In these cases, however, both the District Court and the Court of Appeals went beyond the complaints, relying upon their own recollection of hearsay reports and purported judicial notice to support their postulation of facts contrary to the allegations of the complaints. The propriety or impropriety of their doing so is discussed later in this brief; but the fact that they did so makes it both appropriate and necessary for this Court, in reviewing the decisions, to have as full a picture of the facts which are truly cognizable by judicial notice as is possible. The majority opinion in the Court of Appeals postulates an "insurrection" at Kent State University on May 4, 1970, and also postulates that plaintiffs' decedents were killed "during" a "riot" at Kent. Judge O'Sullivan, concurring, charges plaintiffs' attorneys with "dissembling," and asserts that the pleadings "were clearly contrived to hide rather than disclose the true background of the involved events." These factual postulations and charges so color the decisions being reviewed that this Court cannot perform its own task of review without taking fully into account what is now public knowledge about the Kent State event.

The circumstances giving rise to the present cases were the subject of exhaustive investigation by an official Commission authorized by the Congress and appointed by the President of the United States. The Report of that Commission, the President's Commission on Campus Unrest, which was transmitted to the President on September 26, 1970, is a proper subject of judicial notice. 8 *Cyc. Fed. Pro.* §26.222. The Commission's factual conclusions may not control in the face of competent evidence at a trial; but where, as here, complaints have been dismissed before answer, the Commission's findings are a better source of factual premises than anything relied upon by the courts below. Pages 233-290 of the *Report of the*

President's Commission on Campus Unrest, supplemented by 120 pages of photographs, constitute the Commission's Special Report on Kent State. The account which follows is a condensation of the Commission's Special Report, emphasizing salient points.

Northeastern Ohio late in April, 1970, was beset with wild-cat trucker strikes. To deal with striker violence, the Governor (defendant Rhodes), on April 29 issued a proclamation calling out the National Guard. That proclamation mentioned seven counties of the state by name but Portage County, the location of Kent, was *not* one of those specified. Several things are notable about that April 29 proclamation. Although the preamble recited that sheriffs and police had proved "unable with their own forces to bring about a cessation of violence," and that "the Mayors of many Ohio cities . . . have urgently requested" National Guard aid, these findings had to do with the truck strike disturbances, not with any prior or anticipated campus unrest. Furthermore, while the military forces were to "act in aid of the civil authorities," the import of this was merely that the military commanders should "consult with [the civilian authorities] to the extent necessary to determine the objects to be accomplished." Notwithstanding the rule of the cases in Ohio and elsewhere, including this Court, as will be detailed in the next section of this brief, the proclamation specifically provided that "the procedure of execution" was to be left to "the discretion of the commanding military officer designated by the Adjutant General." No control over the discretion of the military officers was reserved by the proclamation even to the Governor himself; the Adjutant General was left free to designate whatever and however many units he chose, and in his own discretion "to take action necessary for the restoration of order throughout the State of Ohio." (When a few days later the language, "throughout the State," was given application to localities as to which no formal gubernatorial finding of civilian incapacity had been made, the tremendous scope of this abdication of civilian authority into military hands would become clear.)

While the Ohio National Guard was on duty for the truckers' strikes, the President's war policy in Southeast Asia took a

dramatic new turn. On the night of April 30, the President announced that he had ordered United States troops into Cambodia. The daylight hours of May 1 at Kent State were marked only by some peaceful protest assemblies; but that evening a series of incidents more or less related to unhappiness over the new turn in war policy produced about \$10,000 in property damage to about 15 business buildings in downtown Kent, some minor property damage on the University campus, two police injuries from rocks or other missiles, and 15 arrests. During the night, at the request of the Mayor of Kent, a National Guard liaison officer was sent to survey the situation in Kent; but no military troops were authorized or sent.

On May 2, among several other steps taken to prevent a recurrence of violence and disorder, an injunction was procured against damage or destruction of buildings or other property. There was no injunction, however, against assemblies or rallies, a fact that was specifically pointed out in leaflets distributed on the University campus by University officials. Late in the afternoon of May 2, in the face of rumored new violence, the Mayor of Kent telephoned the Governor's office with a request for National Guard assistance. The jurisdiction of the Mayor of the City of Kent over the campus of Kent State University was dubious at best. City police in Kent regarded the campus as outside their jurisdiction, and subject to the University's campus police. The University officials privy to the Mayor's request for the National Guard were under the impression that the Guard was being requested for duty only in the city of Kent and not on the Kent State campus. No University official ever requested National Guard assistance, on that day or on any other.

Considering the language of his April 29 proclamation, "throughout the State of Ohio," to be adequate to cover the Kent situation, the Governor verbally authorized the commitment of guardsmen to the City of Kent without any written proclamation. (A *post facto* proclamation covering Kent and the Kent State University campus was issued three days later, on May 5, after the Guard had been present there for more than two days and after the shootings giving rise to this litigation had already occurred.) Guardsmen bivouaced at

Akron, ten miles from Kent, were placed on standby. In the evening on May 2, a crowd growing to about 1,000 persons gathered on the campus, and after a short while moved toward the ROTC building. No effort was made by the campus police or any other civilian forces to prevent persons in the crowd from stoning or otherwise damaging the ROTC building. Even after the building had been set afire, no police were deployed until after firemen had arrived and been forced to withdraw. Only then did the campus police appear, using tear gas to drive the crowd away from the burning ROTC building. Meanwhile, a few minutes before the ROTC fire had been started, the Mayor of Kent (but no University official) had secured the dispatch of the alerted National Guardsmen into the City of Kent.

Upon arriving in Kent and conferring with the Mayor, but without consulting with or requesting or receiving permission from any University official, the Adjutant General of Ohio (defendant Del Corso) sent National Guard troops onto the campus. By midnight, without benefit of any request or instructions from University officials, the National Guard had cleared the campus with tear gas, and held it secure.

On the morning of May 3 the Governor arrived in the City of Kent, and held a news conference in which he vehemently denounced campus violence and pledged to "eradicate the problem." After two hours the Governor left the city, having done nothing to resolve the uncertainties about applicable rules and relative authority that still had the various civilian officials and peace forces confused. The University officials, in particular, (including defendant White) surmised that their authority had been preempted, and abdicated to the National Guard. That evening, at about 9 p.m., the National Guard dispersed a crowd from the Campus Commons, and after two hours of ensuing non-violent demonstrations, a half-hour of rock throwing, tear gas, minor injuries and arrests ended the day of May 3.

May 4 was a Monday. Classes were scheduled and held as usual. Both at the University and in the City of Kent, the ordinary functioning of institutions was unimpaired. The courts were open and operating, and city as well as University

officials performed their duties without interference. No buildings or public places were occupied or obstructed.

There still had not been any request or invitation from University officials for assistance or protection by the National Guard. The University President assumed his authority had been superseded, and he simply resigned himself to the Guard's control. As the morning advanced, plans for a noon rally were rumored around the campus. No civilian authority had forbidden such a rally, but the National Guard commander determined that it should be banned. By about 11:45 a.m., about 500 persons had gathered on the Campus Commons. No acts of violence had taken place. No speakers were inciting the crowd. No unlawful intent was apparent in the assembly.

Nevertheless the troop commander (defendant Canterbury) ordered that the crowd be dispersed.

The troops were ordered to "lock and load" their weapons thus chambering live ammunition ready to fire. A University policeman riding with riflemen in a National Guard jeep approached the crowd to convey the order to disperse, and some rock throwing and chanting began. A few hundred more students by now had joined the crowd, and the Guardsmen, fixing bayonets and firing tear gas, began to move them out. For the next thirty minutes, tear gas and epithets, and occasionally rocks, filled the air. One group of the guardsmen (consisting of Cavalry Troop G and some other units) drove a part of the crowd past the administration building and down a hill to a parking lot adjoining a football practice field. For about ten minutes the guardsmen remained on the practice field, separated from the parking lot by a high chain link fence. Rocks and tear gas cannisters were lobbed back and forth over the fence. At one point the members of Cavalry Troop G huddled in an apparent conference; at another point they knelt and aimed their rifles at the crowd. After about ten minutes on the practice field, the guardsmen were ordered by the Adjutant General to return up the hill. As they did so, the men of Troop G lagged and fell out of formation as they looked back over their shoulders at the dwindling parking lot crowd. At the crest of the hill, several members of Troop G

turned in unison approximately 135 degrees, retraced a few steps, and began to fire. Other guardsmen then turned and joined in the fusilade. The thirteen-second barrage of more than 60 shots was concentrated in the parking lot, more than 100 yards away.

In the Conclusion to its Special Report on Kent State, the President's Commission had this to say of the events which most proximately gave rise to the litigation now before this Court: "The May 4 rally began as a peaceful assembly on the Commons—the traditional site of student assemblies. Even if the Guard had authority to prohibit a peaceful gathering—a question that is at least debatable—the decision to disperse the noon rally was a serious error. The timing and manner of the dispersal were disastrous. Many students were legitimately in the area as they went to and from class. . . . The rally was peaceful, and there was no apparent impending violence. Only when the Guard attempted to disperse the rally did some students react violently." *Report of the President's Commission on Campus Unrest* 288 (1970). And with specific reference to the fusilade that caused the deaths of these plaintiffs' decedents, the Commission concluded: "The indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and inexcusable." *Id.* at 289.

In addition to the President's Commission on Campus Unrest, the FBI investigated the Kent State shootings, compiling some 8,000 pages of evidence. The FBI report was reviewed by a team of lawyers in the Department of Justice, who prepared a Summary of the FBI findings. A copy of that Justice Department Summary was given by Jerris Leonard, then head of the Civil Rights Division, to Senator Stephen Young of Ohio. Young secured the publication of the Summary (without Justice Department approval) as Chapter 4 of I. F. Stone's book, *The Killings at Kent State: How Murder Went Unpunished* (1971). The entire Justice Department Summary has since been published in the *Congressional Record*. 119 Cong. Rec., E207 *et seq.* (daily ed., Jan. 15, 1973). This Justice Department Summary, as an official government document,

is also properly subject to judicial notice. 8 *Cyc. Fed. Pro.* § 26.222. Among the conclusions stated in the Justice Department Summary are the following:

"Just prior to the time the Guard left its position on the practice field, members of Troop G [107th Armored Cavalry] were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .

"The Guard was then ordered to regroup and move back up the hill past Taylor Hall."

"The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistance. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded."

"Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation."

"We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions."

"[One guardsman] admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."

"Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons."

"No verbal warning was given to the students immediately prior to the time the Guardsmen fired."

"There was no request by any Guardsmen that tear gas be used."

"There was no request from any Guardsman for permission to fire his weapon."

"The Guardsmen were not surrounded."

"No Guardsman claims he was hit with rocks immediately prior to the firing."

"There was no sniper."

"The FBI conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon."

"At the time of the shooting, the National Guard clearly did not believe that they were being fired upon."

"Each person who admits firing into the crowd has some degree of experience in riot control. None are novices."

"A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds."

"Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student."

"Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

“Four students were killed, nine others were wounded, three seriously. Of the students who were killed, Jeff Miller’s body was found 85-90 yards from the Guard. Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot.”

“Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day.”

No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away; another, 75 yards; another, 95 or 100 yards; another, 110 yards; another, 125 or 130 yards; another, 160 yards; and the other, 245 or 250 yards.

“Seven students were shot from the side and four were shot from the rear.”

“Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC building on Saturday, May 2, 1970.”

“As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and Wrentmore were merely spectators to the confrontation.”

“Aside entirely from any questions of specific intent on the part of the Guardsmen or a predisposition to use their weapons, we do not know what started the shooting.”

Notwithstanding these conclusions of the Justice Department lawyers who reviewed the FBI investigation, John N. Mitchell, who at the time was Attorney General (although also involved

in the President's re-election campaign), refused to permit a federal grand jury investigation of the Kent State shootings to determine whether charges under 18 U.S.C. § 241 or § 242 should be brought. However, on May 10, 1973, and subsequently to at least two representatives of the press who made the information public, Deputy Assistant Attorney General K. William O'Connor, who was head of the Criminal Section of the Civil Rights Division at the time when the Justice Department Summary was prepared, acknowledged that the evidence in the Department's hands is (and was then) ample to support the indictment of several guardsmen involved in the shooting for violation of 18 U.S.C. § 242.

At a press conference on June 15, 1973, Assistant Attorney General J. Stanley Pottinger, who became head of the Civil Rights Division in February, 1973, acknowledged that he had personally undertaken a full-scale review of the Justice Department files on the Kent State matter. On August 3, 1973, Pottinger announced at another press conference that on his recommendation Attorney General Elliot L. Richardson had authorized a formal reopening of the Kent State case, and that a federal grand jury investigation of the shootings may be undertaken. In addition, the staff of a subcommittee of the House Judiciary Committee chaired by Representative Edwards of California is conducting an investigation, looking toward forthcoming subcommittee hearings into the actions of former Ohio governor (and defendant) Rhodes and others in connection with the events giving rise to this litigation.

These are all facts of common public knowledge which are subject to judicial notice. It is against the background of these facts, not to mention the allegations of the unanswered complaints, that the decisions of the courts below must be judged. And in this light Judge Weick's postulation of "insurrection" and "riot," and Judge O'Sullivan's charges of "dissembling" and contrivance "to hide rather than disclose the true background of the involved events," stand out as utterly shocking premises for the decision of the Court of Appeals.

II. LEGAL CONTEXT OF THE ISSUES

The complaints in these cases, in obedience to *Fed. R. Civ. P. 8(a) (2)*, confine themselves to a "short and plain statement of the claim." They do not detail all that has been recited heretofore in this brief. But in conformity with *Fed. R. Civ. P. 8 (f)*, "so construed as to do substantial justice" they aptly allege facts supporting causes of action entitling the plaintiffs to judicial relief. In order for the significance of the lower courts' immunity holdings to be appreciated, it is necessary to consider the character of the causes of action stated, which would merit relief but for the immunity bar.

The allegations of the complaints with regard to defendant Rhodes are that as governor of Ohio he caused armed state military troops to be placed on the Kent State University campus without sufficient cause, authorized them to disperse lawful assemblies, permitted them to carry guns loaded with live ammunition, and failed to keep them under proper control. Facts supporting these allegations, found by the President's Commission or the Justice Department or both (and therefore susceptible of judicial notice for purposes of this present review) and provable by the plaintiffs if they are ever permitted a trial, include Rhodes' verbal authorization of the commitment of guardsmen to the City of Kent late in the afternoon of May 2, without formal finding or proclamation of need and without any request from University officials, and while civilian institutions were functioning; his delegation of power, without effective civilian supervision, to "the discretion of the commanding military officer designated by the Adjutant General;" his failure to clarify lines of responsibility and command during his presence in Kent on May 3; his inflammatory public comments at that time; and his failure to order strict military troop subordination to the local civilian officials at the scene.

The allegations with regard to defendants Del Corso and Canterbury are that as Adjutant General and Assistant Adjutant General and the chief military officers on the scene they ordered their troops onto the campus without sufficient cause, with indifference and disregard for the lives of students; authorized

them to disperse lawful assemblies; authorized them to use loaded weapons; and failed to keep them under control so as to prevent them from shooting the decedents. Among the facts supporting these allegations, judicially noticeable for purposes of reviewing these dismissals and provable if plaintiffs are permitted a trial, are these defendants' deployment of troops on the campus without request, authorization, or supervision by any University official, while civilian institutions were functioning and University operations were unimpaired; their orders to "lock and load" weapons; Canterbury's order to disperse the May 4 assembly at a time when it had not become and was not threatening to become either disorderly or unlawful, and at a time and in a manner posing unreasonable dangers to innocents and bystanders; and their failure either to prevent or to immediately stop the "unnecessary, unwarranted, and inexcusable" sustained fusilade directed against distant persons by troops under their direct and immediate command.

The allegation against defendant White is that as President of the University he omitted to act when his actions could have decreased the risk of shootings such as that which occurred. Among the supporting facts are that White failed to assert his legitimate authority over military troops on the campus, abdicated his responsibility, acquiesced in the arrogation of authority by defendants Del Corso and Canterbury, and countenanced the deprivations of constitutional rights which it was his responsibility and duty to prevent.

If these allegations with regard to defendants Rhodes, Del Corso, Canterbury, and White are proved, they will make out claims for violation of some of the most fundamental, essential, and frequently reiterated safeguards of constitutional liberty and domestic security. First, the constitutional rights of peaceable assembly and petition are fundamental, and cannot be infringed at the whim even of civilian, let alone military, convenience. "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expedience dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." *Reid v. Covert*,

354 U.S. 1, 14 (1956). "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). In these cases, these defendants' acts as alleged in the complaints caused the intentional infringement of constitutional rights of assembly and petition, and also, in consequence, of the decedents' rights to life.

Second, the right to civilian government—to the primacy of civilian law and officials and the complete subordination of military personnel and power—is a right that is constitutionally secured and protected. The rule of due process in the historic tradition of English, and even more emphatically, of American law dictates that so long as civilian institutions are capable of functioning military personnel may be utilized to deal with civilians only as an essentially *civilian* supplemental force, completely under the control and direction of local civilian officials, subject to the rules and restraints of civilian law, and neither bound nor protected by the rules of military law. Specifically, due process forbids the displacement of regular civilian officials' judgment and discretion by the supervening power of a military commander, even as to the "procedure of execution" of designated objectives. Ohio's own jurisprudence recognizes this principle. *State of Ohio v. Coit*, 8 Ohio Dec. 62 (C.P. 1897). It has been reaffirmed time and time again by this Court and by other courts. E.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Sterling v. Constantin*, 287 U.S. 378, 392, 403-04 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866); *Faubus v. United States*, 254 F.2d 797, 806-07 (8th Cir. 1958); *Constantin v. Smith*, 57 F.2d 227, 236, 238-39 (E.D. Tex. 1932); *United States ex rel. Palmer v. Adams*, 26 F.2d 141, 144-45 (D. Colo. 1928); *United States v. Phillips*, 33 F. Supp. 261, 269 (N.D. Okla.), vacated because of erroneous use of three-judge court, 312 U.S. 246 (single judge thereafter entered identical decree); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 223-24, 19 P.2d 582, 588-89 (1933); *Hearon v. Calus*, 178 S.C. 381, 410, 183 S.E. 13, 25 (1935); see also *Wilson & Co. v. Freeman*, 179 F. Supp. 520, 527 (D. Minn. 1959). Comprehensive historical research and legal analysis has reinforced the judicially reiterated rule. E.g., Note,

Constitutional Law—Martial Law, 75 W. Va. L. Rev. 143 (1973); Note, *Martial Law and the National Guard*, 18 N.Y. L. F. 216 (1972); The Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders*, 43 Colo. L. Rev. 399 (1972); Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1 (1971); Comment, *Constitutional Law—The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations*, 59 Ky. L. J. 547 (1970); Comment, *Martial Law*, 42 So. Cal. L. Rev. 546 (1969); Mutter, *Some Observations on Military Involvement in Domestic Disorders*, 29 Fed. B. J. 59 (1969). For a succinct discussion see *Brief of The Law Revision Center as Amicus Curiae in Gilligan v. Morgan*, ____ U.S. ____ (No. 71-1553, decided June 21, 1973).

The contrary practice flourished for a time earlier in the century, under the impression that a governor's discretion in superseding civilian rule with military power was not subject to review. That practice of utilizing troops in derogation of civilian law and ordinary civilian officials, according to Frederick Bernays Wiener, "rested on an unfortunate Supreme Court dictum in *Moyer v. Peabody*," 213 U.S. 78 (1909). Wiener, *Martial Law Today*, 55 A.B.A.J. 723, 724 (1969). The dictum, by Justice Holmes for the Court, was that "the Governor's declaration that a state of insurrection existed is conclusive of that fact." 213 U.S. at 83. Holmes himself later acknowledged, in a different context, the impermissibility of letting a branch of government decide conclusively for itself when the circumstances prerequisite to extraordinary powers are present. *Chastleton v. Sinclair*, 264 U.S. 543, 547 (1924). But with regard to the habit of governors and National Guard commanders to supersede civilian law and officials on pretext of emergency, as Frederick Bernays Wiener noted, "It took the decision in *Sterling v. Constantin*, [287 U.S. 378] handed down in 1932, to put an end to such outrages," Wiener, *supra*, 55 A.B.A.J. at 724.

Regrettably, in the forty years since *Sterling* the lessons of history and the precepts of due process have faded from recollection again. In the period since January 1, 1968, military troops have been utilized in domestic situations more

frequently than during any comparable period in American history; and as the facts giving rise to this present litigation illustrate, they are commonly used in violation of the rules of civilian due process heretofore enforced by this Court. Legislators at the present time have under active consideration proposals to more effectively implement the constitutional standards for employment of military troops in domestic emergencies. *See, e.g., 119 Cong. Rec. H3615 (Daily ed., May 10, 1973)* (remarks of Congressman Seiberling of Ohio). Reaffirmation of these historic principles by this Court at this time would be of substantial aid to the Congress. Proof of the urgent need for such reaffirmation is presented by the opinion of the Court of Appeals in the cases now under review, relying explicitly upon the "unfortunate Supreme Court dictum" in *Moyer v. Peabody* to hold that a state chief executive's actions with respect to the use of military troops in times of purported emergency must not be subjected to judicial review.

The allegations of the complaints against the named and unnamed officers and members of the Ohio National Guard allegedly involved in the shootings at Kent State are that they each, or persons under their direct command, acting under color of state law, without legal justification or pursuant to patently unlawful orders intentionally, willfully, wantonly, recklessly, and maliciously fired live ammunition at decedents and other persons, in disregard of the lives and safety of decedents and the others. Among the supporting facts are the behavior of Cavalry Troop G on the football practice field, huddling and then kneeling to aim rifles at persons on the other side of the fence as one guardsman, apparently an officer, fired a pistol shot, perhaps as a signal; that Troop's disarray on ascending the hill; the unison of the about-face at the crest of the hill; the retracing of steps before firing; the distance of the victims from the firing guardsmen; the lack of any threat from the students to the guardsmen at or immediately before the firing; the sustained nature and long duration of the fusillade; the need for physical restraint to make some guardsmen cease firing; and the apparent contrivance of false excuses and justifications afterwards. Facts such as these, in the knowledge of the Department of Justice, have persuaded Deputy Assistant Attorney General O'Connor that several of

the guardsmen are indictable under 18 U.S.C. § 242, as stated earlier in this brief. It is inconceivable that such facts, if proved, would make out no civil cause of action. In addition to a cause of action for wrongful death under state law, where the facts show such summary deprivation of life or imposition of grave bodily injury arbitrarily by officers of and on behalf of the state those facts make out a cause of action under the federal Civil Rights laws.

The allegations of these complaints against defendants Rhodes, Del Corso, Canterbury, White, and the named and unnamed officers and members of the Ohio National Guard thus clearly state causes of action under 42 U.S.C. § 1983, in addition to, in the cases of plaintiffs Krause and Miller, state law causes of action determinable in federal court on diversity grounds. It is these manifest causes of action that the lower courts in these cases have barred, by erecting barriers of immunity to dismiss the complaints before answer and without allowing the plaintiffs any chance to prove their allegations at trial.

III. THE ISSUES FRAMED BY THE CERTIORARI PETITION

A. Factual Assumptions Contrary to the Unanswered Complaints

Seldom if ever has any case demonstrated so poignantly the importance of the principle that for purposes of a motion to dismiss under *Fed. R. Civ. P.* 12 (b) (1), just as under 12 (b) (6), the uncontroverted allegations of a complaint must be taken as true. 5 Wright & Miller, *Federal Practice & Procedure* § 1350, at pp. 551-52; § 1357, at pp. 594-96. The insistence by the District Court and by the majority of the Court of Appeals in these cases upon their own preconceived view of the untried facts, to the point of accusing the plaintiffs' counsel of deliberate deception, indelibly marks the decisions below as sheer feats of will.

B. The Eleventh Amendment

Both the District Court and the Court of Appeals in these cases held that the plaintiffs' complaints could not be entertained because of the eleventh amendment.

It is true that under the doctrine of *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), it is sometimes possible to view a suit which names only government officials personally as defendants, as being "in substance" a suit against the state itself for eleventh amendment purposes. For a detailed analysis of the complicated and confused intellectual process by which the doctrine announced in *Larson* evolved, see Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 22-8, 32-41 (1972). However, the *Larson* doctrine is subject to at least one uniformly recognized exception: that a suit naming only government officials personally as defendants *cannot* be viewed as "in substance" a suit against the state itself when the acts alleged as giving rise to the cause of action are acts which are prohibited by the Constitution or which violate constitutional rights. This exception was explicitly recognized in *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). Although the majority below purported to rely upon *Dugan*, they apparently ignored *Dugan's* recognition of this exception to the *Larson* rule. As detailed in Part II of this brief, the complaints in these present cases explicitly and unequivocally allege facts showing violations of fundamental constitutional rights under color of state law.

The majority below made much of the supposed interference with the functions of state officers that would purportedly result from judicial entertainment of these complaints. But the Supreme Court answered that fear long ago, explaining that the "fancied inconvenience" of interference which might result from allowing suits of officers for their unconstitutional acts is seen to "vanish . . . at once upon the suggestion that such interference is not possible, except when the government seeks to [act] . . . contrary to law . . . and in violation of the Constitution of the United States." *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

Indeed, precisely the proposition now espoused by the Court of Appeals—that suits against officers personally for their unconstitutional acts can be barred by the eleventh amendment—was urged upon and categorically repudiated by the Supreme Court in the *Poindexter* case, *supra*. This Court at that time denounced this very proposition as “the doctrine of absolutism, pure, simple, and naked; and of communism . . .,” and this Court declared that “[t]he doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it.” 114 U.S. at 291. If that proposition were sound, constitutional rights would be largely unenforceable, and the pretense of constitutional restraints upon government would become a farce.

The contrary rule, which holds the eleventh amendment inapplicable to suits against officers for unconstitutional acts, is illustrated by *Ex parte Young*, 209 U.S. 123 (1902). The majority below dismissed *Young* as “inapposite” because *Young* was an action for injunction, whereas the present complaints seek damages. But it is equitable relief, not relief in damages, which is extraordinary. The present cases are *a fortiori* to *Young*. Indeed, it has always been taken for granted that the reason why equitable relief against an officer’s unconstitutional action is available is simply that the remedy at law in damages, available as a matter of course, might be inadequate. See, e.g., *Sterling v. Constantin*, 287 U.S. 378 (1932). Relief in damages against officers personally for their unlawful or unconstitutional actions had been regularly awarded for more than a century before *Young* was decided. See, Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 14-21 (1972), and cases there cited. Suits for unlawful or unconstitutional acts against federal government officials personally were already familiar and traditional when the Reconstruction Congress provided a comparable federal remedy for constitutional violations by state government officials by enacting what is now 42 U.S.C. §1983. Although the traditional practice for enforcing constitutional rights may for a time have been lost sight of, the essential principle underlying it was very recently reasserted by this Court in *Bivens v. Unknown Named Agents*, 403 U.S. 388 (1971), recognizing a cause of action for damages against federal officials personally for

violation of constitutional rights. In the present case, involving state officials, the enactment by Congress of 42 U.S.C. § 1983 makes judicial creation of the remedy unnecessary; but the same considerations that compelled creation of the remedy in *Bivens* preclude the efforts that have been made by the lower courts here to emasculate § 1983.

Liability under 42 U.S.C. § 1983 "is entirely personal in nature intended to be satisfied out of the individual's own pocket." *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971). By its terms § 1983 reaches only acts under color of state law, which ordinarily will be acts of state officials. The adoption by the courts below of the heretofore consistently denounced and rejected proposition that such a suit can be barred by the eleventh amendment, is tantamount to a judicial repeal of § 1983. It is no wonder that no precedent can be found to support their decision.

Justice would be better served with respect to all parties if instead of continuing the tradition of enforcing limitations upon the government by suits against individual officers, this Court were to hold that the fourteenth and some other amendments modify the earlier eleventh amendment, so as to make possible direct suits for redress against the state itself, leaving the state to deal as it chooses with its own faithless servants. By that rationale or any of several others, supported by ample reason and precedent, the harshness which sometimes characterizes the traditional remedy could be avoided without eliminating the right of redress for constitutional wrongs. See the discussion in support of such an approach in Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 60-77 (1972). To date, however, this Court has not chosen to follow that course. So long as redress against the state itself is not allowed, the right to recover from officers personally on proof of allegations like those in the complaints in these cases cannot be frustrated by interposition of the eleventh amendment, without candidly abandoning the pretense that ours is a system of government limited by law.

C. Personal Privilege or Immunity of Executive Officials

Unlike the District Court, the Court of Appeals in these cases was not content to base the dismissals upon untenable eleventh amendment grounds, but added as an alternative rationale an unprecedented rule of categorical and unqualified personal privilege or personal immunity for executive officials. In the words of Judge Weick's opinion for the majority, "since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the Executive."

This is not a question of first impression. This Court has fully considered the matter, and has found that applying different rules of personal privilege to executive officials than to judicial or even legislative officials is not "incongruous" at all. The difference between judicial immunity and the far more limited privilege allowable to executive officials under 42 U.S.C. § 1983 was confirmed by this Court in *Pierson v. Ray*, 386 U.S. 547 (1967). The absolute privilege or immunity enjoyed by judicial (and also by legislative) officials is supported by sound public policy, centuries of legal history, and even some constitutional language. See Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 42-7 (1972). But an absolute privilege or immunity for executive officials is supported by none of these.

The most generous rule of personal privilege or immunity for executive officials that has ever been approved by this Court for application under 42 U.S.C. § 1983 is that approved in *Pierson v. Ray*, 386 U.S. 547 (1967), allowing executive officials a defense of good faith and probable cause. There can be no doubt that the allegations of the unanswered complaints in these cases, taken as true for purposes of *Fed. R. Civ. P. 12* (b), negate both good faith and probable cause.

In point of historical fact, the traditional rule in American law was that executive officials were personally liable for unconstitutional acts *even notwithstanding* good faith, probable cause, noble intentions, or obedience to orders. Numerous

cases and authorities illustrating this traditional rule and explaining why it has adhered to so rigorously are cited and discussed in Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 14-20, 47-51 (1972). Post-Civil War federal statutes purporting to immunize executive officials were held unconstitutional under the federal Constitution by lower courts. *E.g.*, *Griffin v. Wilcox*, 21 Ind. 370, 372-373 (1863); *Milligan v. Hovey*, 17 F. Cas. 380, 381 (No. 9605) (C.C.D. Ind. 1871). While the Supreme Court never had occasion to pass squarely upon the validity of these statutes, there are strong indications that if it had the Court would have agreed that insofar as they purported to confer immunity for unconstitutional acts those statutes were void. *See, e.g.*, *Poindexter v. Greenhow*, 114 U.S. 270 (1885); *Mitchell v. Clark*, 110 U.S. 633, 648-49 (1884) (opinion of Field, J, speaking to a point not reached by majority); *United States v. Lee*, 106 U.S. 196 (1882). It was not until the twentieth century that a few courts, and then some commentators, failing to review the American precedents with the care that was required, began to resort to the pre-Revolutionary "common-law" rule of executive official privilege and consider it applicable even to positive torts. The etiology of that error is examined in Engdahl, *supra*, 44 Colo. L. Rev. at 51-4.

A generous rule of privilege was countenanced, at least for a time, by the Second Circuit Court of Appeals, with respect to actions against federal officials as distinguished from actions under 42 U.S.C. § 1983. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). More recently, however, the same Second Circuit Court of Appeals itself apparently recognized the unwisdom of the *Gregoire* rule, and applied instead the much less generous privilege rule of good faith and probable cause that had been approved by this Court in *Pierson v. Ray*, *supra*. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

Some language from *Gregoire* was quoted in dicta by Mr. Justice Harlan in *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959); but *Barr* involved a federal rather than a state official, did not arise under a specific statute like § 1983 specially

authorizing the relief that was sought, and most important, did not involve any alleged infringement of constitutional rights. Justice Harlan himself was acutely aware that no such generous privilege can be extended to executive officials where violations of constitutional rights are concerned: Harlan joined in the Court's opinion in *Pierson v. Ray*, *supra*, allowing executive officials only the defense of good faith and probable cause where constitutional rights were infringed; and Harlan's concurring opinion in *Bivens v. Unknown Named Agents*, 403 U.S. 388, 398 et seq. (1971), while not addressing the personal privilege point, is an eloquent statement of the importance of affording redress in damages for constitutional wrongs.

Consequently the decision below, contriving a wholly novel rule of absolute personal executive immunity, constitutes a departure from American constitutional tradition that is of radical proportions indeed.

The Court of Appeals endeavored to reinforce its unprecedented ruling, at least insofar as it dealt with the governor, defendant Rhodes, by referring to *Moyer v. Peabody*, 212 U.S. 178 (1909). Earlier in this brief it was pointed out that the language in *Moyer* relied upon below has been characterized by the most noted contemporary American authority on military law as "an unfortunate Supreme Court dictum," which regrettably gave colorable justification to many instances of "phony" martial law earlier in this century until this Court's decision in *Sterling v. Constantin*, 287 U.S. 378 (1932) at last "put an end to such outrages." Frederick Bernays Wiener, *Martial Law Today*, 55 A.B.A.J. 723, 724 (1969). Because of the treatment given them below, however, the language of *Peabody* and the later holding in *Sterling v. Constantin* must be more closely examined here.

The dictum in *Moyer* suggested that a governor's finding of the circumstances justifying supersession of ordinary civilian officials and procedures ("insurrection") was conclusive and could not be questioned in court. 213 U.S. at 83. Following this suggestion, the Court of Appeals in these present cases held, "nor should we make [state chief executives'] actions in this respect in times of emergency, subject to judicial

review." But the *Moyer* dictum was wrong and this Court has refused to follow it; in *Sterling v. Constantin*, *supra*, notwithstanding the dictum in *Moyer*, this Court reviewed the facts which a governor had found to justify supersession of ordinary civilian officials and procedures, held that they did not, and found the governor's military acts in derogation of civilian laws and officials to be unlawful.

In *Moyer* the Court had also suggested that military troops could lawfully imprison or even shoot citizens "without sufficient reason." 212 U.S. at 84. But in *Sterling v. Constantin*, the Court took a closer look at the facts that had been alleged in *Moyer*, and found (like the Circuit Court in *Moyer* had found, see *Moyer v. Peabody*, 148 Fed. 870 (C.C.D. Colo. 1906)) that because of its "direct relation" to the solution of the problem the arrest and detention of Mr. Moyer had been reasonable; and with the facts of *Moyer* so reinterpreted the *Sterling* Court cautioned that "the general language of the [*Moyer*] opinion must be taken in connection with the point actually decided." 287 U.S. at 400. As thus reinterpreted in *Sterling*, whatever privilege *Moyer* might afford is limited to acts which are judicially found in retrospect to have been directly related to a lawful mission; and even this privilege pertains to the employment of troops in what the *Moyer* Court had postulated as an actual "insurrection," not to mere civil disorder, and certainly not to the dispersal of a peaceful assembly.

Under *Sterling*, it is recognized that the determination whether exigencies require the use of military aid for the purpose of *faithfully executing the civilian laws* is a determination to be made conclusively by the governor. 287 U.S. at 399. It is also recognized that there is "a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order" 287 U.S. at 399-400. This latitude, in effect, allows a defense of good faith and probable cause. 287 U.S. at 400. But as the Court held in *Sterling*, this does not mean that a governor or anyone who acts under him can supersede civilian law and authorities with military officers and force, and escape judicial scrutiny by his own self-serving declaration of necessity. "What are the

allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." 287 U.S. at 401. "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." 287 U.S. at 398.

Sterling cannot be distinguished from these present cases on the ground that in *Sterling* the governor had *eo nomine* declared "martial law." If that were a point of distinction at all, it would strengthen these plaintiffs' case; for here the displacement of ordinary civilian authority and the disregard of ordinary law and constitutional rights occurred in the absence of any formal proclamation that civilian law was disabled. Thus if anything the present cases are *a fortiori* to *Sterling*. Actually, however, the presence or absence of any sort of declaration is not really a point of distinction. The displacement of civilian by military authority, as distinguished from the enlistment of aid from military units under strict obedience to local civil officers and law, is the *de facto* imposition of martial law, and is forbidden by the rule of due process. See Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 70 n. 324 (1971). And *Sterling* held that such a constitutional violation is necessarily a matter for judicial inquiry "in an appropriate proceeding directed against the individuals charged with the transgression." 287 U.S. at 398.

42 U.S.C. §1983 affords the appropriate proceeding and remedy. These plaintiffs only ask their rightful opportunity to prove the transgression.

D. The Diversity Claims in Krause and Miller

As Judge Celebrezze in part V of his dissenting opinion in the Court of Appeals pointed out, two of the three cases now before this Court—*Krause* and *Miller*—state causes of action under state law which were brought within the District Court's jurisdiction on diversity grounds. The District Court and the

majority in the Court of Appeals completely disregarded these diversity claims. The only thing to be added to Judge Celebrezze's excellent discussion of this aspect of these cases is that Ohio, by statute, specifically countenances damage actions against National Guardsmen for acts done on active duty in civil disorder situations which constitute "willful or wanton misconduct." *Ohio Revised Code* §5823.37 (Supp.). The allegations in the *Krause* and *Miller* complaints incontrovertibly allege acts of "willful or wanton misconduct."

E. The United States Not a Necessary Party

In what seems scarcely more than makeweight, the majority below held that the United States was a necessary party to these cases because a decision could implicate the training and weaponry of the National Guard, for which the United States bears some responsibility.

The complaints do allege that the defendant guardsmen were inadequately trained and improperly permitted to use loaded weapons. That, however, was not accountable to the United States. This Court has already found, in *Gilligan v. Morgan*, ___ U.S. ___, 93 S. Ct. 2440 (1973), that at the time of the events giving rise to these complaints Ohio's training and weaponry practices for civil disorders were out of compliance with United States policy for the National Guard. Neither the affirmative unlawful acts nor the negligent or reckless acts charged against the various defendants in these cases in any way implicate the United States, nor will the interests of the United States be affected by adjudication of these cases. This ground of the decision below is patently spurious.

CONCLUSION

Restraint in the face of alleged facts so egregious as those presented in these complaints and judicial conduct such as that indulged in by the courts below, is exceedingly difficult. But perhaps this is an instance when eloquent declamations would detract from the force of the naked facts themselves.

This Court's current docket contains cases presenting in several different contexts historic questions concerning the amenability of the executive branch of government to the restraints of constitutional and ordinary law. These present cases are among them. These cases, however, while historic, are not unprecedented. The principles for their resolution are thoroughly settled by prior decisions. And Anglo-American history also records the grave misfortunes that are risked when those well-settled principles are disregarded.

All that these plaintiffs ask is the opportunity to prove the allegations of their complaints. The deepest traditions of our law demand that they have that opportunity. The question is simply whether this Court will allow it.

Respectfully submitted,

David E. Engdahl
4375 Butler Circle
Boulder, Colorado 80303
(303) 443-2211, ext. 6911

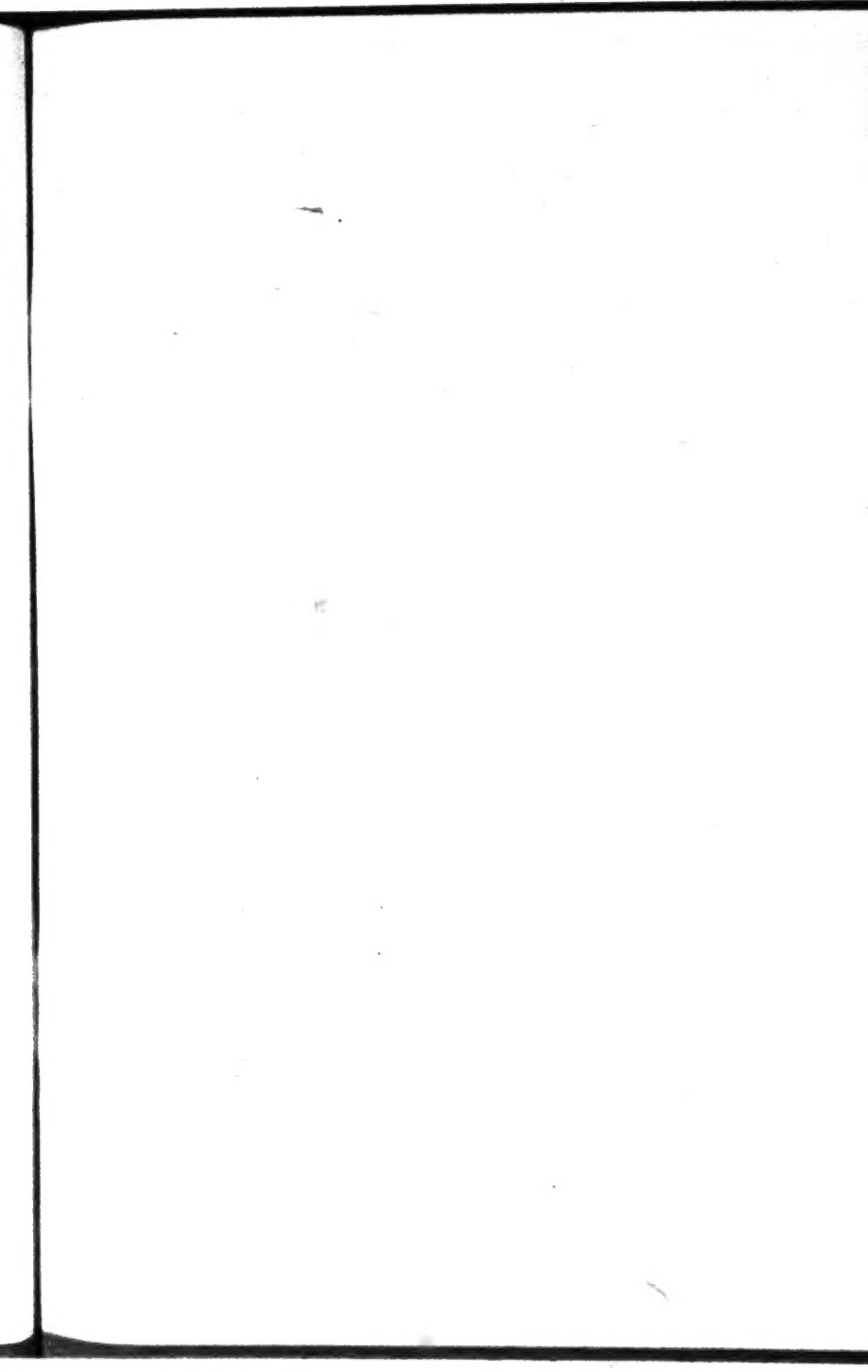
Attorney for Amici,

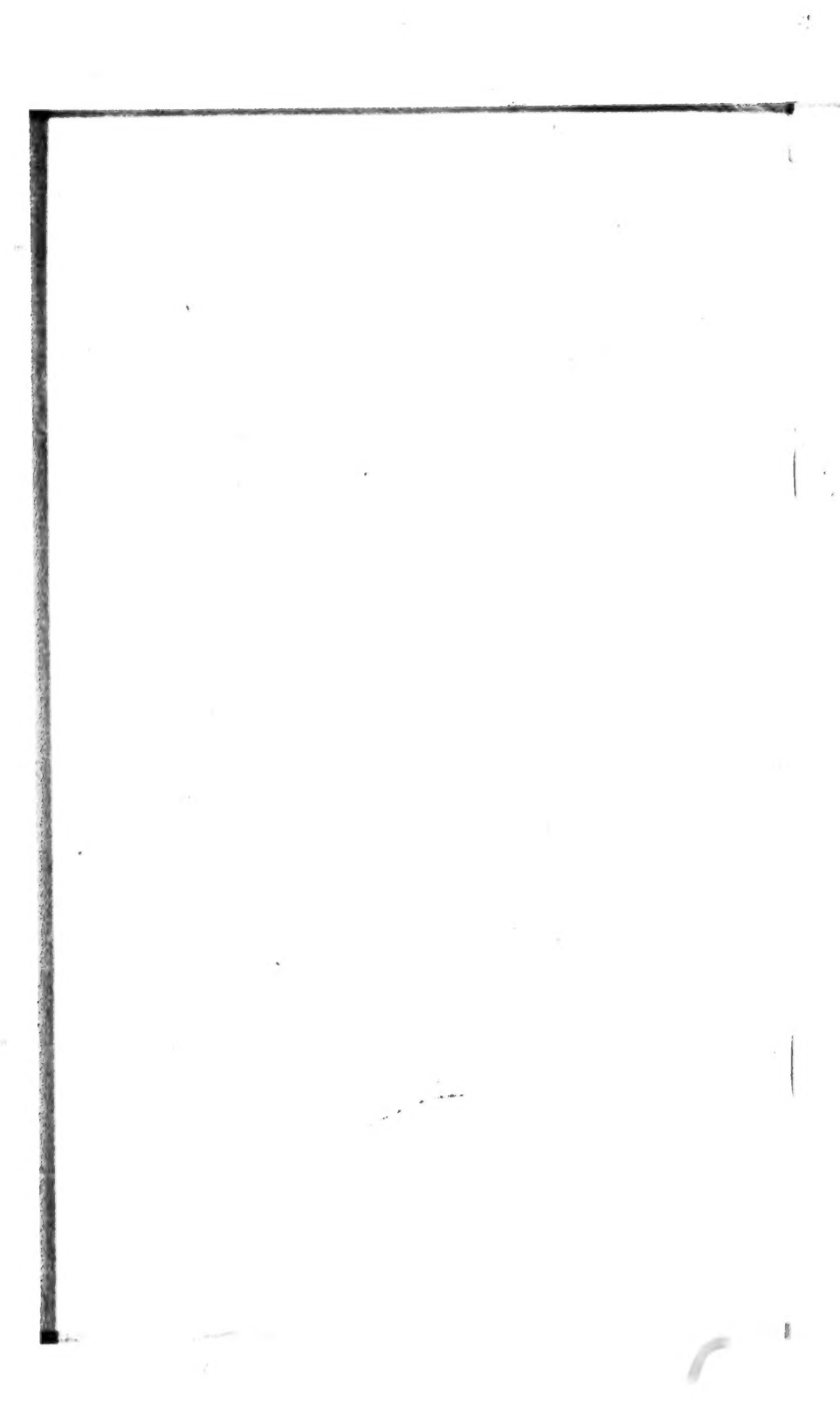
The National Council of the
Churches of Christ in the
U.S.A.

The Union of American Hebrew
Congregations.

The Board of Church and Society
of the United Methodist
Church, and

The United Presbyterian Church
in the U.S.A.





SEP 7 1973

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1973

No. 72-1318

ARTHUR KRAUSE, ADMINISTRATOR
of the Estate of Allison Krause, *et al.*,
Petitioners,

v.

JAMES RHODES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE
and
BRIEF IN SUPPORT OF PETITIONERS
ON BEHALF OF THE NATIONAL BAR ASSOCIATION
AS AMICUS CURIAE

CARL J. CHARACTER
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100
*Attorney for Amicus
National Bar Association*

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
BRIEF OF AMICUS CURIAE	3
Constitutional and Statutory Provisions Involved in the Case	3
Interest of Amicus Curiae	5
Statement of the Case	5
Summary of Argument	5
Argument	6
I. Is the Eleventh Amendment Modified by the Fourteenth Amendment so as to Allow Suits in Federal Courts Against States and State Officials for Violations of Fourteenth Amendment Rights?	6
II. Is the Eleventh Amendment a Bar to a Damage Action Brought Against the Governor of Ohio, and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities While Acting Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983?	14
Conclusion	17

TABLE OF AUTHORITIES

Cases

<i>Bivins v. Six Unknown Federal Narcotics Agents</i> , 403 U.S. 388, 420 (1971)	9
<i>Chisholm v. Georgia</i> , 2 U.S. (2 Doll) (1793)	11
<i>Griffin v. County School Board of Prince Edward County</i> , 377 U.S. 218 (1964)	15
<i>Hargrove v. Town of Cocoa Beach</i> , 96 So. 2d 130 (1957)	8
<i>Krause v. State</i> , 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971)	6, 7
<i>Krause v. State</i> , 31 Ohio St. 132, 285 N.E.2d 736 (1972)	7
<i>Mapp v. Ohio</i> , 367 U.S. 643, 659 (1961)	11
<i>Marbury v. Madison</i> , 1 Cranch 137, 163 (1803)	11
<i>Mitchum v. Foster</i> , 92 S. Ct. 2151 (1972)	12
<i>Monroe vs. Pape</i> , 365 U.S. 171 (1961)	15
<i>Muskopf v. Corning Hospital District</i> , 359 P.2d 457, 458, 459 (1961)	8
<i>Prout v. Starr</i> , 188 U.S. 537, 543 (1903)	13
<i>Sterling v. Constantin</i> , 287 U.S. 378 (1932)	15
<i>Young, Ex parte</i> , 209 U.S. 123 (1908)	15
<i>Zwickler v. Koota</i> , 389 U.S. 245 (1967)	12

Law Review Articles

<i>Verkuil, Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State</i> , 50 N. CAROLINA L. REV. 549 (1972)	10
--	----

Constitutions

Constitution of the United States:

Amendment IX	3, 9
Amendment XI	3, 5, 6, 11, 12, 13, 14, 16
Amendment XIV	4, 5, 6, 11, 12, 13, 15
Ohio Constitution, Article I, Section 2	4, 9

Statutes

Civil Rights Act of April 20, 1871, 17 Stat. 13, 42	
U.S.C. § 1983	4, 5, 12, 13, 14, 15, 16

Other Authorities

Declaration of Independence	9
-----------------------------------	---

Supreme Court of the United States

October Term, 1973

No. 72-1318

ARTHUR KRAUSE, ADMINISTRATOR
of the Estate of Allison Krause, *et al.*,
Petitioners,

v.

JAMES RHODES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Bar Association respectfully moves, pursuant to Rule 42, for leave to file the attached brief amicus curiae on behalf of Petitioners. Oral consent of the Petitioners and all Respondents except Respondent James Rhodes has been granted. Respondent James Rhodes' consent has been denied.

The National Bar Association is a national organization of judges and lawyers. It has among its purposes, the sound and orderly administration of justice and the securing, for everyone, the free and untrammelled use of rights

guaranteed by the Constitution of the United States, including the right to due process of law and the equal protection of the laws. It believes that for every right there must be an available remedy; and to that end, open and equal access to the courts for fair, impartial determinations, and redress is essential.

The issues in the instant cases and the decision of this Court will have a substantial effect on pending and future cases where access to the courts is sought and, therefore, these cases are of vital concern to the National Bar Association. It is respectfully requested that this motion for leave to file an amicus brief be granted. Filed herewith is our brief as amicus curiae.

Respectfully submitted,

CARL J. CHARACTER

1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

*Attorney for Amicus
National Bar Association*

Supreme Court of the United States

October Term, 1973

No. 72-1318

ARTHUR KRAUSE, ADMINISTRATOR
of the Estate of Allison Krause, *et al.*,
Petitioners,

v.

JAMES RHODES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE THE NATIONAL BAR ASSOCIATION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

2. United States Constitution, Amendment XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ."

3. United States Constitution, Amendment XIV:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

4. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Ohio Constitution, Article I, Section 2:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary. . ."

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of the Amicus in this litigation is set forth in the Motion for Leave to File, bound together with this brief at page 1, *supra*.

The arguments of the Amicus in this brief support the position of Petitioners in this case.

STATEMENT OF CASE

Petitioner's statement of the case is hereby adopted.

SUMMARY OF ARGUMENT

The argument in Part 1 is summarized as follows: The doctrine of sovereign or governmental immunity is in violation of the due process of law and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The Eleventh Amendment barring suits in the federal courts by citizens against states, is modified by the Fourteenth Amendment so as to permit such suits where Fourteenth Amendment rights are violated.

The argument in Part 2 is summarized as follows: Neither the Eleventh Amendment nor judicial precedent bar suits in federal courts against state officials in their individual capacities for violations of Fourteenth Amendment or 42 U.S.C. § 1983 guaranteed rights.

ARGUMENT**I. Is the Eleventh Amendment Modified by the Fourteenth Amendment so as to Allow Suits in Federal Courts Against States and State Officials for Violations of Fourteenth Amendment Rights?**

The doctrine of sovereign or governmental immunity had its roots in Roman Law and the English Common Law. It has, at sometime or other and in varying degrees been a part of the law of every state.

Total governmental immunity no longer exists at the state level because of the many legislative and/or judicial exceptions. The more recent trend has been its total rejection at the state level on the ground that it violates the Fourteenth Amendment.

Judge Day of the Eighth Circuit Court of Appeals of Ohio in speaking for the majority in *Krause v. State*, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), stated:

"Governmental immunity is an anachronism. It represents a vestige of the ancient apothecosis of the state in the person of a king. That the king can do no wrong is a dubious concept in a nation whose very founding repudiated kings. Discussions of such immunity begin with the idea of protecting acts of state (something greater than the sum of its citizens) and finish by shielding the wrongful acts of men. A person claiming injury is unprotected in either case. If, in fact, a culpable injury has been done and goes unchastised by the law because of the doctrine of sovereign immunity, that doctrine protects injustice for no better reason than its source is the state. And the concept becomes this: 'the king can do wrong with impunity.' This is outlaw doctrine obviously incompatible with the rule of law. Moreover, the notion that government may irresponsibly maim or kill contravenes the most elemental notions of due process of law." 274 N.E.2d 321, 324-325.

"The operation of the doctrine of sovereign immunity results in different consequences for injured persons in at least two ways. Persons victimized by private tort feasons may be compensated for their damages. But so long as sovereign immunity is extant persons suffering damage through comparable fault on the part of the state may not recover unless the tortious action happens to be one within a specific exception to the immunity rule. Assuming a case within a specific exception, then two classes of persons injured by the state develop—those hurt in the course of the excepted activity and those not. Such circumstances raise the question whether such differences as those described mount arbitrary and unreasonable distinctions incompatible with the constitutional standard established by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." 274 N.E. 2d 321, 326-7.

* * * * *

"If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend upon a gossamer as frail as that supporting those distinctions on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification of a rational policy and a denial of equal protection is crossed. *This fatally offends the Constitution.*" 274 N.E.2d 321, 327. (Footnotes omitted)

The well reasoned opinion and the decision of the Court of Appeals overruling sovereign immunity in Ohio in *Krause v. State*, 274 N.E.2d 321 (1971), was specifically overruled and reversed by the Ohio Supreme Court, thus reaffirming sovereign immunity in Ohio, in *Krause v. State*, 31 Ohio St. 132, 285 N.E.2d 736 (1972). Justice

Lloyd O. Brown in part of his dissenting opinion in *Krause v. State, supra*, points out the unjustness of the doctrine:

"However, it is my belief that Section 16, Article I, on its face and as applied by the state (in the absence of such consent), unconstitutionally discriminates against the victims of state acts of negligence, in violation of the equal protection provision of the United States Constitution. It infringes upon one of the most fundamental progenitors of due process of law, through which all other legal rights may be enforced—access to the courts unhindered by the need for the expressed consent of the party-defendant."

The California Supreme Court, in *Muskopf v. Corning Hospital District*, 359 P.2d 457 (1961) rejected governmental immunity, and Justice Traynor speaking for the court about governmental immunity at 359 P.2d 457, 458-9 stated:

"From the beginning there has been misstatement, confusion and retraction. At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. (Footnote omitted.) How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' Borchard, *Governmental Responsibility in Tort*, 34 Yale L.H. 1,4."

Also see *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (1957).

The mystery deepens when it is realized that the United States was founded on the repudiation of the King.

Further, neither the Founding Fathers nor the people of Ohio made the United States or the State of Ohio the sovereign, but reserved sovereignty to themselves.

The reservations of Sovereignty in the People is contained in the Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed, . . .*" (Emphasis added)

The Constitution of the United States, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others retained by the people.*"

and The Constitution of the State of Ohio (1851), Article I, Section 2:

"*All political power is inherent in the people.* Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; . . ."

Though conceptually dubious, sovereign or governmental immunity has been a part of the American Common Law, and in some instances codified law, for two hundred (200) years. However, neither past longevity nor judicial precedent justify the continuation of a doctrine that is both outdated and unjust.

Chief Justice Burger in his dissent in *Bivins v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388, 420 (1971), stated:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the

past.' Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897)."

The continuation of the doctrine of sovereign immunity seems to rest on the reasoning that, without it, suits against the state would become financially burdensome and state officials would be deterred in the unflinching performance of their duty. Neither of these reasons are justification today.

"Although the doctrine emanated from the idea that the sovereign is supreme, its main justification has been that to allow suits against states would be financially burdensome. While this argument may have been entitled to considerable weight in the financially precarious period immediately following the Revolution, it hardly suffices to justify the doctrine in the present day. Given the availability of insurance and the ability of states to raise revenues, there is no reason to protect the state from the legitimate claims of its constituents. Indeed, there is every reason to make the state responsible for the torts of its officials both as a matter of reasonable risk allocation and of social justice. But the states' awareness of their responsibility has been far from uniform. While at least six states have gone so far as to provide compensation for the innocent victims of violent crime committed by private individuals, others still refuse to provide compensation for similar crimes committed by their own agents and officials. Ironically, at least one state has enacted such legislation while preserving the traditional view of sovereign immunity. It is exceedingly difficult to rationalize a decision to assume responsibility for injurious acts of criminals but to refuse responsibility for those same acts by officials of the state." (Footnotes omitted). Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N. CAROLINA L. REV. 549, 558-9 (1972).

Inasmuch as governments have been created for the protection of the rights of the people, it would seem that

they, above all, should be held responsible for the acts of their officials, agents or employees in violating the rights of the people. As stated by Justice Clark in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961):

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

It was early established in American Law that the protection of the laws was a basic right.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

The doctrine of sovereign or governmental immunity denies equal protection of the laws and due process of law to those injured by the wrong-doings of the state. Obviously, such a denial by the state, in the absence of the Eleventh Amendment, would be an unconstitutional violation of the Fourteenth Amendment.

The Eleventh and Fourteenth Amendments were both passed in response to historically significant events. The Eleventh to protect the states from feared contract suits, such as *Chisholm v. Georgia*, 2 U.S. (2 Doll) (1793), which could result in substantial money judgments against a state; and the Fourteenth, some seventy-five years later, in response to the widespread violence against newly freed slaves and others in the south in violation of their federal rights, and the inability, unwillingness, and/or opposition of the states, state courts and state officials to protect these rights.

The Eleventh Amendment is in broad terms to the extent that it prohibits "any suit in law or equity" by a citizen against a state in a federal court. On the other hand, Section I of the Fourteenth Amendment is narrow

to the extent that it seeks to protect only basic federal rights from infringement by a state, and 42 U.S.C. § 1983 passed pursuant to Section V of the Fourteenth Amendment gives protection against individual infringements of basic federal rights.

The constitutional rights secured from infringement by the states, and/or individuals acting under color of state law, by virtue of the exact language of the Fourteenth Amendment and 42 U.S.C. § 1983, were intended to be protected by the Federal Government and enforced through the federal courts. *Mitchum v. Foster*, 92 S. Ct. 2151 (1972), *Monroe v. Pape*, 365 U.S. 171 (1961), *Zwickler v. Koota*, 389 U.S. 245 (1967).

With the Eleventh Amendment denying the federal courts the power to entertain any suits against the state and the Fourteenth Amendment creating federal rights against the state enforceable in federal courts; an obvious conflict occurs.

For the very reasons that brought about Section I of the Fourteenth Amendment (i.e., the inability, unwillingness, and/or opposition of the states, state courts, and state officials to protect federal rights), this conflict must be resolved in favor of the Fourteenth Amendment, so as to allow suits in federal courts against states, and state officials acting under color of law, in violation of Section I of the Fourteenth Amendment and 42 U.S.C. § 1983.

To do any less would be to deem Section I of the Fourteenth Amendment and 42 U.S.C. § 1983 to have created rights without corresponding remedies, and thus make a mockery of what is one of the most significant amendments to the Constitution of the United States with respect to individual rights.

"The Constitution of the United States, with the several amendments thereof, must be regarded as one

instrument, all of whose provisions are to be deemed of equal validity. It would indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment." Justice Shiras in *Prout v. Starr*, 188 U.S. 537 543 (1903).

For these reasons, this Court should determine that the Fourteenth Amendment qualifies the Eleventh Amendment to the extent that it conflicts with the Fourteenth Amendment in preventing suits in the federal courts against states and state officials brought pursuant to Section I of the Fourteenth Amendment and/or Section I of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. § 1983, and order trial of the Respondents herein on the merits.

II. Is the Eleventh Amendment a Bar to a Damage Action Brought Against the Governor of Ohio, and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities While Acting Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983?

The majority opinion of the United States Sixth Circuit Court of Appeals in upholding the dismissal of these actions on the pleadings held as follows (Opinion of Judge Weick, Scheuer Appendix p. 20a):

"We hold that the actions against the Governor, the Officers of the National Guard, and the President of Kent State University, are in substance and effect actions against the State of Ohio. Suits against the State are prohibited by the Eleventh Amendment . . ."

The Court of Appeals in arriving at its holding adopted and affirmed the theory of the District Court as follows (Opinion of Judge Weick, Scheuer Appendix, p. 4a):

"The theory of the motions to dismiss was that these suits, although nominally against the Chief Executive and Officers of the State, in substance and effect were against the State of Ohio since they directly and vitally affected the rights and interest of the State in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public . . ."

Both the theory and holding of the majority below are in conflict with the Eleventh Amendment of the Constitution of the United States and with the prior holding of this Court.

Further, if the circuit court's majority opinion is adopted by this Court, such adaptation would effectively

deny any federal court remedy to a person seeking to vindicate his constitutional rights under Section I of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1871.

The Eleventh Amendment is essentially negative in that it restricts the Judicial power of the United States. The restriction is very specific, in preventing suits in law or equity in the federal courts by individuals against one of the several states. It contains no restriction or even mention of suits commenced or prosecuted against state officials or officers in their individual capacities.

The Amendment itself thus denies its extension to cover state officials.

The Fourteenth Amendment prohibits a state from depriving any person of due process of law or equal protection of the laws. Section One of the Civil Rights Act of April 20, 1971, 17 Stat. 13, 42 U.S.C. § 1983 creates a right of action against *every person* who under color of state law deprives another of his constitutional rights.

The *every person* referred to, has included all levels of state officials in their individual capacity; to wit: Governor and Militia General in *Sterling v. Constantin*, 287 U.S. 378 (1932); state and county officials and school boards in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); police officers in *Monroe v. Pape*, 365 U.S. 167 (1961); Attorney General in *Ex parte Young*, 209 U.S. 123 (1908), and many other state officials.

In *Ex parte Young*, *supra*, the contention was made that the suit against the Minnesota Attorney General was in essence a suit against the state and therefore barred by the Eleventh Amendment. In a decision which has been cited and followed consistently, this Court held that it was not a suit against the state and not barred by the Eleventh

Amendment; even though, the injunction granted and upheld against the Attorney General effectively enjoined the state from enforcing a state statute, as the Attorney General was the only state official authorized to enforce the statute. In its decision this Court stated:

"If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U.S. 123, 156-60.

It is thus seen that precedent denies the extension of the Eleventh Amendment to cover state officials.

The extension of the Eleventh Amendment prohibition to state officials would effectively nullify Section One of 42 U.S.C. § 1983. As stated by Judge Celebrezze in his dissent below (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 32a):

"... I find no authority to support such an extension of the Amendment, nor do I understand the majority's disregard for the Supreme Court's ruling in *Ex parte Young* 209 U.S. 123 (1908). Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. § 1983, with its requirement that defendants thereunder be shown to have acted under color of state law."

For these reasons, this Court should reject the unwarranted and unsupported extension of the Eleventh Amendment to cover the Respondents herein and order trial on the merits.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the United States Sixth Circuit Court of Appeals, and remand this case for trial on the merits.

Respectfully submitted,

CARL J. CHARACTER

**1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100**

***Attorney for Amicus
National Bar Association***

OCT 9 1973

IN THE
Supreme Court of the United States
OCTOBER TERM 1973

MICHAEL ROBAK, JR., CL.

No. 72-914

SARAH SCHEUER, Administratrix of the
Estate of Sandra Lee Scheuer, Deceased,

vs. Petitioner,

JAMES RHODES, Governor of the State of Ohio,
SYLVESTER DEL CORSO, Adjutant General of the
Ohio National Guard, ROBERT CANTERBURY,
Assistant Adjutant General of the Ohio National
Guard, HARRY D. JONES, a Major of the Ohio
National Guard, JOHN E. MARTIN, and RAY-
MOND J. SRP, Captains of the Ohio National Guard,
and ROBERT WHITE, President, Kent State -

University, Respondents,
and

No. 72-1318

ARTHUR KRAUSE, Administrator of the
Estate of Allison Krause, Deceased,

vs. Petitioner,

GOVERNOR JAMES RHODES, et al.,
and Respondents,

ELAINE B. MILLER, Administratrix of the
Estate of Jeffrey Glenn Miller, Deceased,

vs. Petitioner,

JAMES RHODES, Governor, et al.,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF FOR RESPONDENT JAMES A. RHODES

(Continued Inside Front Cover)

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved in this Case	2
Questions Presented	4
Statement of the Case	5
Summary of the Argument	7
Argument	8

I.

ON MOTIONS TO DISMISS THE COMPLAINTS, THE DISTRICT COURT CORRECTLY MEASURED ALLEGATIONS OF THE COMPLAINTS AGAINST FACTS CONTAINED IN THE GOVERNOR'S PROCLAMATIONS ATTACHED TO THE MOTIONS AND AGAINST FACTS OF WHICH THE COURT TOOK JUDICIAL NOTICE	8
---	---

II.

THE GOVERNOR OF OHIO IS PROTECTED BY UNQUALIFIED EXECUTIVE IMMUNITY AGAINST COMPLAINTS CHARGING THAT HIS OFFICIAL, DISCRETIONARY ACTS GIVE RISE TO A CAUSE OF ACTION UNDER 42 U.S. CODE §1983 OR UNDER THE DIVERSITY JURISDICTION OF THE FEDERAL COURTS	16
---	----

III.

UNDER THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE	
---	--

DISTRICT COURT LACKED JURISDICTION
OF THE SUBJECT MATTER OF THE
KRAUSE, MILLER AND SCHEUER COM-
PLAINTS -----

26

IV.

THE KRAUSE, MILLER, AND SCHEUER
COMPLAINTS, TO THE EXTENT THEY
CHARGE IMPROPER TRAINING, ARMING
AND PROCEDURES OF THE OHIO NA-
TIONAL GUARD, RAISE POLITICAL QUES-
TIONS THAT ARE NOT JUSTICIABLE -----

37

V.

THE ALLEGATIONS IN THE KRAUSE AND
MILLER COMPLAINTS THAT TRAINING,
ARMING AND PROCEDURES OF THE OHIO
NATIONAL GUARD WERE IMPROPER IN-
DISPENSABLY REQUIRE JOINDER OF THE
UNITED STATES OF AMERICA AS A
PARTY-DEFENDANT -----

39

Conclusion -----

41

TABLE OF CASES CITED

	Page
<i>Barr v. Matteo</i> , 360 U.S. 564, 3 L.Ed. 2d 1434, 79 Sup. Ct. 1335 -----	34, 35, 36
<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971) -----	30
<i>Borden's Farm Products Company v. Baldwin</i> , 293 U.S. 194 (1934) -----	15
<i>Collins v. Hardyman</i> , 341 U.S. 651 (1951) -----	9
<i>Conley v. Gibson</i> , 355 U.S. 41, 45-46 (1957) -----	11
<i>Cruz v. Beto</i> , 405 U.S. 319, 323 (1972) -----	11
<i>Employees v. Missouri Public Health Dept.</i> , 36 L.Ed. 2d 251 (1973) -----	30
<i>Erie Railroad Company v. Tompkins</i> , 394 U.S. 64 (1938) -----	20
<i>Ex Parte Young</i> , 209 U.S. 123 (1908) -----	28
<i>Franklin v. Meredith</i> , 386 F. 2d 958 (10th Cir. 1967) -----	17
<i>Gilligan v. Morgan</i> , --- U.S. ---, 37 L.Ed. 2d 407, 93 Sup. Ct. -----	37, 38, 39
<i>Gregoire v. Biddle</i> , (C.A. 2 N.Y.) 177 F. 2d 579, 581 -----	34, 35, 36
<i>Haines v. Kerner</i> , 404 U.S. 519 (1972) -----	11
<i>Hammond v. Brown</i> , 323 F. Supp. 362 (N.D. Ohio 1971) aff'd 450 F. 2d 480 (6th Cir. 1971) -----	13
<i>Hoffman v. Halden</i> , 268 F. 2d 280 (9th Cir. 1959) --	17
<i>Ickes v. Fox</i> , 300 U.S. 82 (1937) -----	9
<i>Ickes v. Virginia Colorado Development Corporation</i> , 295 U.S. 639 (1935) -----	9
<i>Jenkins v. McKeithin</i> , 395 U.S. 141, 423-424 (1969) -----	11

	Page
<i>King v. Jones</i> , 319 F. Supp. 653 (N.D. Ohio 1971), rev'd 450 F. 2d 478 (6th Cir. 1971); Ct. of App. judgment vacated and remanded to Dis- trict Court for dismissal for mootness, 415 U.S. 911 (1972) -----	13
<i>Lumbermens Mutual Casualty Company v. Rhodes</i> , 403 F. 2d 2 (10th Cir. 1968); certiorari denied, 394 U.S. 965 (1969) -----	17
<i>Moyer v. Peabody</i> , 212 U.S. 78 (1909) -----	18, 19, 24, 25, 32, 33
<i>Perez v. Ledesma</i> , 401 U.S. 82 (1971) -----	30
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963) -----	14, 15
<i>Sanial v. Bossoreale</i> , 279 F. Supp. 940 (S.D. N.Y. 1967) -----	12
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966) -----	14, 15
<i>Silber v. Dickson</i> , 403 F. 2d 642 (9th Cir. 1968) -----	18
<i>Smith v. Sperling</i> , 354 U.S. 91 (1957) -----	12
<i>Spalding v. Vilas</i> , 161 U.S. 483, 40 L. Ed. 780, 16 Sup. Ct. 631 -----	35
<i>Sterling v. Constantin</i> , 287 U.S. 378 (1932) -----	24, 25, 32, 33
<i>United States v. Cigarette Merchandisers'</i> <i>Association</i> , 18 F. R.D. 497 (S.D. N.Y. 1955)---	12
<i>Walker Process Equipment, Inc. v.</i> <i>Food Machinery and Chemical Corp.</i> , 382 U.S. 172, 174-175 (1965) -----	11

TABLE OF AUTHORITIES CITED

Page

STATUTES and RULES:

Federal Rules of Civil Procedure, Rule 8(d)	10, 11
Federal Rules of Civil Procedure, Rule 8(f)	10, 11
Federal Rules of Civil Procedure, Rule 12(b)(1)	4, 9, 10, 11, 12, 16
Federal Rules of Civil Procedure, Rule 12(b)(6)	4, 9, 10, 12, 16
Ohio Revised Code, Sec. 5923.21	3, 24, 25
Ohio Revised Code, Sec. 5923.22	3, 23, 25
Ohio Revised Code, Sec. 5923.37	5, 20
28 U.S. Code, Sec. 1332	20
28 U.S. Code, Sec. 1652	20
42 U.S. Code, Sec. 1983	5, 8, 16, 17, 20, 26, 29, 30, 31
United States Supreme Court Rules, Rule 40(5)	24

CONSTITUTIONAL PROVISIONS:

Constitution of the State of Ohio, Article I, Sec. 16	20
Constitution of the State of Ohio, Article III, Sec. 10	27
Constitution of the United States of America, Eleventh Amendment	2, 4, 6, 7, 20, 26, 27, 28, 29, 30, 31, 32
Constitution of the United States of America, Fourteenth Amendment	29, 41

TEXTS:

2A Moore's Federal Practice, Section 12.08	12
2A Moore's Federal Practice, Section 12.16	12

**IN THE
Supreme Court of the United States**

No. 72-914

SARAH SCHEUER, Administratrix of the
Estate of Sandra Lee Scheuer, Deceased,

vs. Petitioner,

JAMES RHODES, Governor of the State of Ohio,
SYLVESTER DEL CORSO, Adjutant General of the
Ohio National Guard, ROBERT CANTERBURY,
Assistant Adjutant General of the Ohio National
Guard, HARRY D. JONES, a Major of the Ohio
National Guard, JOHN E. MARTIN, and RAY-
MOND J. SRP, Captains of the Ohio National Guard,
and ROBERT WHITE, President, Kent State

University, Respondents,

and

No. 72-1318

ARTHUR KRAUSE, Administrator of the
Estate of Allison Krause, Deceased,

vs. Petitioner,

GOVERNOR JAMES RHODES, et al.,

and Respondents,

ELAINE B. MILLER, Administratrix of the
Estate of Jeffrey Glenn Miller, Deceased,

vs. Petitioner,

JAMES RHODES, Governor, et al.,

Respondents.

BRIEF OF RESPONDENT JAMES A. RHODES

OPINIONS BELOW

The consolidated Memorandum Opinion and Order of
the United States District Court for the Northern District
of Ohio, Eastern Division, in the Krause case (C 70-544),

the *Miller* case (C 70-816) and the *Scheuer* case (C 70-859) has not been printed. It appears in the Appendix of the *Krause-Miller* Petition for Certiorari at pages 34-46.¹

The Sixth Circuit Court of Appeals also treated the three cases in one opinion. It is officially reported in 471 F. 2d 430 (1972). Also, it is printed in the Appendix of the *Scheuer* Petition for Certiorari at pages 1a-69a.

JURISDICTION

This Court granted a Writ of Certiorari on June 25, 1973, to review the decision of the Sixth Circuit Court of Appeals in the *Krause* and *Miller* cases (No. 72-1318). On the same date, on a separate Petition, a Writ of Certiorari was likewise granted in the *Scheuer* case (No. 72-914). Jurisdiction of this Court was invoked in both Petitions under Title 28, U.S. Code, §1254(1).

By permission of the Clerk of this Court, under date of July 18, 1973, Respondents herein were authorized to respond to the *Krause-Miller* brief and the *Scheuer* brief by filing one brief in answer to both. Also on July 18, 1973, the Clerk advised that the time for filing briefs in behalf of the Respondents had been extended to and including October 10, 1973. Respondent James A. Rhodes herewith files his separate brief on the merits. Other respondents are filing a joint brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . ."

1. Herein, "Kr. Br." will refer to *Krause-Miller* brief; "Sch. Br.", to *Scheuer* brief; "Kr. Pet.", to *Krause-Miller* Petition for Certiorari; "Sch. Pet." to the *Scheuer* Petition; "App." to Joint Appendix in *Krause-Miller* cases, and "Sch. App." to the *Scheuer* Appendix.

2. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Jurisdiction in the United States District Court was invoked under 28 U.S.C. §1343(3) and (4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4. Ohio Revised Code §5923.21 (officially set forth in Page's Ohio Revised Code Annotated, Title 59, at page 65:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

5. Ohio Revised Code §5923.22 (officially set forth in Page's Ohio Revised Code Annotated, Title 59, 1972 Supplement at p. 24):

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to

do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities. No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directly to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

QUESTIONS PRESENTED

1. A. Whether a United States District Court is required to take a complaint's allegations as true when deciding a Rule 12(b)(1), Fed. R. Civ. P. Motion to Dismiss.
- B. Whether a United States District Court is required to take a complaint's allegations as true when deciding a Rule 12(b)(6), Fed. R. Civ. P. Motion to Dismiss.
2. Whether an action brought in a United States District Court under Sec. 10 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S. Code, §1983, against the Governor, designated as such, and other officers of the State of Ohio, which specifically charges him with issuing official orders resulting in deprivation of Constitutionally secured rights, and which demands money damages from him personally, is an action against the State of Ohio and by reason thereof, prohibited by the Eleventh Amendment to the United States Constitution.
3. Whether there is a doctrine of unqualified executive immunity that shields the Governor from

personal liability for deprivation of rights secured by the United States Constitution, and if so, whether such doctrine, in an action brought against the Governor under 42 U.S. Code, Sec. 1983, authorizes the dismissal of complaints charging intentional, reckless, willful and wanton actions resulting in deprivation of Constitutionally secured rights upon the Court's judicially noticing facts in rebuttal to such allegations.

4. Whether causes of action asserted in the complaints under diversity jurisdiction and claimed to be derived from Ohio Revised Code Section 5923.37 reach to Respondent James A. Rhodes. (Discussed under Questions 2 and 3 in this brief.)
5. Whether the acts of a Governor in issuing orders to his State's National Guard are shielded from judicial review for the reason that any challenge of such acts presents a non-justiciable political question.
6. Whether the Federal Government is an indispensable party to the adjudication of Petitioners' allegations concerning the training and weaponry of the Ohio National Guard.

STATEMENT OF THE CASE

The *Krause*, *Miller* and *Scheuer* complaints filed in the District Court, in substance, allege that the Governor, the Adjutant General, the Assistant Adjutant General and other officers and men of the Ohio National Guard, acting individually and in conspiracy under color of state law, ordered untrained troops with loaded weapons onto the campus of Kent State University on May 4, 1970 and through their intentional actions, involving deprivation of constitutionally secured civil rights, three students,

Allison Krause, Jeffrey Miller and Sandra Scheuer, were shot and killed. The complaints specifically allege that Respondents intentionally violated the decedents' constitutional rights and that the shooting was the result of willful, wanton, and malicious plans and actions brought about by individual and conspiratorial conduct of the Respondents.

Neither Respondent Rhodes nor the other Respondents filed answers in any of the cases. Instead, they filed a Motion to Dismiss on grounds of provisions of Rule 12(b)(1) and 12(b)(6). Attached to the Motions to Dismiss were copies of proclamations issued April 29, 1970, calling out the Ohio National Guard and one issued May 5, 1970 in supplement to the April 29 proclamation. The Motion to Dismiss was granted by the District Court on June 2, 1971. *Scheuer* separately appealed and *Krause and Miller* jointly appealed to the United States Court of Appeals for the Sixth Circuit. That Court, like the District Court, treated the cases together in reaching judgment and writing its opinion.

Both the District Court and the Sixth Circuit Court of Appeals held that these actions for money payments to the estates of the students whose civil rights were asserted to have been violated, were, in actuality, actions against the State of Ohio and by reason thereof, barred by the Eleventh Amendment. The Sixth Circuit Court of Appeals also held that even if the cases could be treated as one against individuals, the Defendants-Respondents enjoyed executive immunity, unqualified in the case of Respondent James A. Rhodes, Governor, and qualified with respect to the other Respondents. In the Sixth Circuit, a dissent was written by Judge Celebrezze, and the majority opinion was written by Judge Weick.

SUMMARY OF ARGUMENT

In each of the three cases here involved, upon the filing by Respondents of the Motions to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted, the District Court had before it not only the allegations of the complaints, but also the facts contained in the gubernatorial proclamations attached to the Motions to Dismiss and facts of which the District Court itself takes judicial notice. There is no requirement in law that upon the filing of a Motion to Dismiss, the Court must accept all allegations of the complaints as true. It may treat the allegations as rebutted or modified by other facts before it for consideration.

If an action brought against the Governor or other officer of a state, is one in which the relief sought would affect such an essential operation of state government as maintaining public tranquility and order, the action is, in substance, an action against the sovereign state and is, therefore, barred by the Eleventh Amendment. An action to collect money damages from an ex-Governor of a state, charging a deprivation of federally secured constitutional rights by his ordering units of the National Guard to aid civilian authorities maintain order would effectively prevent free exercise of independent judgment by successor governors and would, by that means, affect essential governmental functions.

A governor who has qualified to perform the duties of his office by swearing to support the Constitution of the United States and the Constitution of Ohio and faithfully to execute the laws may, in the conduct of his office, call out his state's National Guard to aid civilian authorities in preserving or restoring public tranquility and order, and may, for that purpose, as Commander-in-Chief, authorize the Adjutant General and subordinate commanders to make decisions with respect to the deploy-

ment and use of troops without giving rise to a right of judicial review of the call-up or subsequent orders. The Governor's official, discretionary acts are protected by unqualified executive immunity against causes of action arising under 42 U.S. Code, §1983, or under the diversity jurisdiction of the federal courts.

The complaints herein, to the extent that they charged improper training, arming and procedures of the Ohio National Guard, raised political questions that are not justiciable. Furthermore, allegations that the training, arming and procedures of the Ohio National Guard were improper indispenably require joinder of the United States of America as a party-defendant. Failure to join an indispensable party requires dismissal of the action. As the United States has not consented to be sued, dismissal is requisite.

ARGUMENT

I. ON MOTIONS TO DISMISS THE COMPLAINTS, THE DISTRICT COURT CORRECTLY MEASURED ALLEGATIONS OF THE COMPLAINTS AGAINST FACTS CONTAINED IN THE GOVERNOR'S PROCLAMATIONS ATTACHED TO THE MOTIONS AND AGAINST FACTS OF WHICH THE COURT TOOK JUDICIAL NOTICE.

In the *Krause-Miller* brief, the first question treated in Argument is stated as follows:

"On a defendant's motion to dismiss a complaint based solely upon the sufficiency of the allegations of that complaint, may a trial or appellate court assume as true factual matters which are contrary to the allegations of that complaint?"

In the *Scheuer* brief, counsel have elected to treat first in Argument their third question, stated as follows:

"Whether a United States district court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when

deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true."

The *Krause-Miller* brief devotes most of its bulk to pointing out recitals in the Sixth Circuit's majority opinion that do not square with allegations of the *Krause* and *Miller* complaints; to similar recitals from Judge O'Sullivan's concurring opinion; to materials claimed to rebut such recitals, some of which are asserted to be from "official" sources (but none of which is contained in the record of the *Krause*, *Miller* or *Scheuer* cases); and to citing three cases claimed to hold that the district court, no matter what, in considering a motion to dismiss, is obligated to accept as true any allegations in a complaint.²

The brief filed herein by Charles E. Brown, Robert F. Howarth, Jr., and William W. Johnston, for Respondents Del Corso, Canterbury, Jones, Martin, Srp, and White starts its Argument by treating the question whether a district court is required to accept the allegations of a complaint as true in deciding a motion to dismiss. In doing so, it separates the question into individual treatments of Motion to Dismiss under Rule 12(b)(1) and 12(b)(6), Fed. R. Civ. P.

Respondent Rhodes adopts the argument offered in the brief of the other Respondents. His own motion to dismiss in the *Krause* case was based on both 12(b)(1) and 12(b)(6) grounds, and his motions to dismiss in the *Miller* and *Scheuer* cases were based on Rule 12(b)(1) and on the further ground that it "affirmatively appears that any act or omission on the part of Governor James A. Rhodes*** was remote from the injury to and death of

2. *Collins v. Hardyman*, 341 U.S. 651 (1951); *Ickes v. Virginia Colorado Development Corp.*, 295 U.S. 639 (1935); *Ickes v. Fox*, 300 U.S. 82 (1937).

plaintiff's decedent, and was separated therefrom by a substantial intervening cause."

The District Court rested its order of dismissal on the 12(b)(1) ground of lack of subject matter jurisdiction (Eleventh Amendment) but spoke also about Executive Immunity, which reflects the 12(b)(6) ground of failure of the *Krause*, *Miller* and *Scheuer* complaints to state a claim upon which relief could be granted (Executive Immunity).

The *Scheuer* Argument, by citing Rule 8 Fed. R. Civ. P. (Sch. Br. 13), states reliance thereon for its contentions that "the allegations of a complaint in federal court must be taken as true for purposes of a motion to dismiss" and "must be construed liberally in favor of the pleader at that stage***." Actually, only Subsection (f) of Rule 8 is cited in support. It reads:

"All pleadings shall be so construed as to do substantial justice."

A more pertinent subsection would be Rule 8(d), which states in its first sentence:

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

Thus, not even Rule 8(d) supports the contention that a federal court, in every case, must take the allegations of the complaint as true when considering a motion to dismiss. Such a motion, under Rule 12, Fed. R. Civ. P., can be the device for raising the 12(b)(1) and (6) defenses.

There is, therefore, nothing in Rule 8, Fed. R. Civ. P. that requires a district court, on consideration of a Rule 12(b)(1) motion, to treat the allegations of the complaint as admitted or otherwise true. This permits the district court to set aside allegations carelessly or

cynically made with no real hope of proof for the tactical purpose of avoiding more accurate statements that would defeat the cause of action. Certainly, there is no requirement in Rule 8, or anywhere else, that on a Rule 12(b)(1) motion to dismiss, the court must believe the unbelievable and act as if it were fact.

In this connection, it should be noted that Sarah Scheuer's counsel recited in his "Statement of the Case" in his Petition for Certiorari (Sch. Pet. 5):

"As a consequence of an investigation conducted ***by petitioner's counsel, petitioner commenced this action in the district court***."

The same counsel then alleged in her complaint, conjunctively, that "Defendant Rhodes, intentionally, recklessly, willfully and wantonly****" engaged in certain conduct. (Sch. Pet. 87a.) However, counsel has now, in his Argument, receded from that extreme allegation and instead has rephrased his allegation in the disjunctive, as follows:

"****the first claim in this case alleges that the defendants acted either 'intentionally, recklessly, willfully' [or] . . . wantonly." (Sch. Br. 8.)

In support of its contention that the allegations of a complaint in federal court must be taken as true for purposes of a motion to dismiss, the *Scheuer* brief cites five cases (Sch. Br. 13), *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cruz v. Beto*, 405 U.S. 319, 323 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 423-424 (1969); and *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965). None is a case involving a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Therefore, all are irrelevant to the 12(b)(1) aspects of the motions to dismiss the

complaints of Krause, Miller and Scheuer filed herein by Respondent Rhodes. Similarly, the citation of the treatise, *Moore's Federal Practice*, with the designation of Section 12.08 at pages 2265-67 as the pages to read (Sch. Br. 13), has an equal irrelevance. That section is concerned with "Motion to Dismiss for Failure to State a Claim", which is a 12(b)(6) motion (Sch. Br. 13).

Counsel for Sarah Scheuer has also cited (Sch. Br. 14) "2A *Moore's Federal Practice*", Section 12.16 at page 2352 as suggesting that even if a motion to dismiss is filed under Rule 12(b)(1) directed to the subject matter jurisdiction of the court, and if such motion involves "disputed factual issues", the court must hold a preliminary, evidentiary hearing to resolve the issue of jurisdiction. Professor J. W. Moore has not said so. The most he has said is that by provision of Rule 12(d), Rule 12(b)(1)-(7) motions shall be heard and determined before trial upon application of any party, and that "certainly it will be advisable generally to decide such defenses as lack of jurisdiction over the subject matter*** promptly after they are raised, and not defer them to the trial." (2A *Moore's Federal Practice*, 2352.) This is on the theory that determining lack of subject matter jurisdiction promptly may make a trial unnecessary.

The *Scheuer* brief lists three cases for examination on this point (Sch. Br. 14): *Sanial v. Bossoreale*, 279 F. Supp. 940 (S.D. N.Y. 1967); *Smith v. Sperling*, 354 U.S. 91 (1957); and *United States v. Cigarette Merchandisers' Association*, 18 F. R. D. 497 (S.D. N.Y. 1955). All are cited in a note to the quotation just given from 2A *Moore's Federal Practice*, page 2352, and they are no stronger in support of the *Scheuer* claim that she should have been provided opportunity to produce rebuttal evidence than Professor Moore's statement itself.

The *Scheuer* brief concludes its Argument that on a motion to dismiss, a district court is required to take the

allegations of a complaint as true by appraising the factual context in which the events recited in the *Scheuer* complaint are alleged to have taken place. (Sch. Br. 14.) It suggests that this court read certain cases.³ Respondent Rhodes was not a party in any of the cases cited and had no opportunity to challenge the purported "facts" produced therein. Further, the *Scheuer* brief hints that much can be learned from "facts" that it anticipates will show up in briefs filed by *amici curiae*. The *Scheuer* brief complains (Sch. Br. 15) that Respondent Rhodes did not attach "sworn facts" to his motion to dismiss and that their lack forbids acceptance of the motion as a "speaking" motion for summary judgment. Suffice it to say that the proclamations attached were official governmental documents, issued by the Governor of the State of Ohio under the Great Seal of the State of Ohio, attested by the Secretary of State and, pursuant to law, filed with the Secretary of State. Moreover, copies of the same proclamations were attached (and referred to as attached) to the Memorandum in Support of the Motion to Dismiss filed by other respondents in the *Krause* and *Miller* cases, which were before Judge James C. Connell in the district court at the same time as the *Scheuer* case. They were thus pleaded, upon authority of counsel admitted to practice in the district court, on the same basis as other statements in the Motions to Dismiss. In pertinent part, Rule 10(c), Fed. R. Civ. P., provides:

"A copy of any written instrument which is an exhibit to pleading is a part thereof for all purposes."

We return now to the *Krause-Miller* brief. As has been suggested earlier, its Argument in support of the contention that a district court, in considering a motion to

3. *Hammond v. Brown*, 323 F. Supp. 362 (N.D. Ohio, 1971), *aff'd* 450 F. 2d 480 (Sixth Cir. 1971); *King v. Jones*, 319 F. Supp. 653 (N.D. Ohio, 1971), *rev'd* 450 F. 2d 478 (Sixth Cir. 1971); Court of Appeals judgment vacated and remanded to District Court for dismissal for mootness, 415 U.S. 911 (1972).

dismiss a complaint must take the allegations of the complaint as true, is devoted mainly to recitations of what counsel describes as "facts" attending the events alleged in the *Krause* and *Miller* complaints. (Kr. Br. 18-27.) Some of it is in the popular art form of "leaks from official sources" that have been given the appearance of truth through publication in the *Congressional Record*. Counsel has been careful to warn (Kr. Br. 27) that

"Petitioners are not presenting this material as necessarily positive or admissible proof of the truth of their allegations. This material is presented for the sole purpose of demonstrating the inappropriateness of the actions of the lower courts in refusing to accept as true the allegations of the complaint in reviewing their sufficiency on a motion to dismiss."

The gravamen of counsel's Argument is that if the district judge and a majority of judges in the Court of Appeals were going to take judicial notice, they should have taken judicial notice of facts as *Krause-Miller* counsel would have them seen, in retrospect. To assist, counsel portrays a warped and distorted representation of events attending the tragic deaths at Kent State and assumes that such portrayal must inescapably be the source of "facts" of which the judges below took judicial notice. It is far more likely that the experienced jurists below well knew how to separate guesswork and fiction from fact in news media accounts of the Kent State episodes. Likewise, they knew how to discount sensationalism and hyperbole.

The *Krause-Miller* brief cites (Kr. Br. 27) *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Rideau v. Louisiana*, 373 U.S. 723 (1963) as authority for the proposition that "this court has condemned the undue saturation of biased

news media exposure in a community where a defendant is faced with a criminal charge". It should be noted that in both cases, the facts were tried by juries, also that Justice Black, who wrote the opinion for the Court in the *Sheppard* case, dissented (and was joined by Justice Harlan) in the *Rideau* case. The point of his dissent was that "unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity***called up some informal and illicit analogy to res judicata, making petitioner's trial a meaningless formality." (373 U.S. 723 at 729.)

In the view of the *Krause-Miller* brief, "If juries must decide issues of fact solely upon admissible evidence, the courts too must shun the influence of the media in determining the legal sufficiency of complaints." (Kr. Br. 28.) Cited in support of this proposition is a quotation from the concurring opinion of Justices Cardozo and Stone in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934). The case seems inapropos. It was one in which an injunction was sought on Fourteenth Amendment grounds against enforcement of a law enacted by the Legislature of New York to set retail prices for milk on a basis that allowed a higher sale price to small dairies than to those with a "well-advertised trade name". Defendants moved to dismiss the complaint upon the grounds that it failed to state a cause of action in equity and that the statute was constitutional. Affidavits were presented on both sides and the case was heard on the motion for injunction and the motion to dismiss. Dismissal by the three-judge district court was reversed by the Supreme Court. The opinion in the case, written by Chief Justice Hughes, contained this language (293 U.S. 194 at page 204):

"In view of the peculiar nature and effect of this provision [discrimination in price], and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face, and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court; unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provisions should be sustained as resting upon a rational basis consistent with constitutional right."

Summing up, the motions to dismiss the *Krause*, *Miller* and *Scheuer* complaints on Rule 12(b)(1) grounds for lack of subject matter jurisdiction empowered the district court to render summary judgment based upon facts, but not conclusions, alleged in the complaints to the extent they were not rebutted by the proclamations filed as attachments to the Motions to Dismiss and by facts of which the district court and later the Court of Appeals took judicial notice. Similarly, the Motion to Dismiss filed by Respondent Rhodes in the *Krause* case, based additionally, on Rule 12(b)(6) grounds, admitted only the facts well pleaded and not rebutted by facts of which the court took judicial notice, including those contained in and suggested by the official governmental documents, copies of which were attached to the Motion to Dismiss, namely the Governor's proclamations.

II. THE GOVERNOR OF OHIO IS PROTECTED BY UNQUALIFIED EXECUTIVE IMMUNITY AGAINST COMPLAINTS CHARGING THAT HIS OFFICIAL, DISCRETIONARY ACTS GIVE RISE TO A CAUSE OF ACTION UNDER 42 U.S. CODE §1983 OR UNDER THE DIVERSITY JURISDICTION OF THE FEDERAL COURTS.

The *Scheuer* brief begins on this point by acknowledging that there is a doctrine of executive immunity from

suit by virtue of official position. It argues that the doctrine has not been dealt with definitively by this Court and that it lacks the firm underpinning in constitutional history that gives impregnability to legislative and judicial immunity. In addition, the *Scheuer* brief argues that even if there were an immunity from suit for official acts resulting in deprivation of rights protected by the federal Constitution, it is not available to those who exercise ministerial rather than discretionary powers and it is not available at all if the conduct complained of exceeded the scope of office. While the argument is tidier than that presented below on this point, it is no better grounded.

First, with respect to a cause of action filed under 42 U.S. Code §1983, the *Scheuer* brief cites six Courts of Appeals decisions from the 2nd, 5th 6th, 7th and District of Columbia Circuits to support its contention that executive immunity for §1983 actions has been rejected by a majority of the lower courts that have considered the issue. (Sch. Br. 28.) The cases cited are the same as cited in the *Scheuer* brief in support of Petition for a Writ of Certiorari (Sch. Pet. 14). The Brief in Opposition to Certiorari filed by the other Respondents herein dissected the cases and documents that they gave no support to the assertion that there is no executive immunity against an action brought under 42 U.S. Code §1983. (Brief of Respondents DelCorso, et al., opposing Certiorari, 14 and 15.) Respondents' brief also identified a consistent line of cases holding state government officials immune to 42 U.S. Code §1983 actions for discretionary acts done within the scope of authority. So cited were *Hoffman v. Halden*, 268 F. 2d 280 (9th Cir. 1959); *Franklin v. Meredith*, 386 F. 2d 958 (10th Cir. 1967); *Lumbermans Mutual Casualty Company v. Rhodes*. 403 F. 2d 2 (10th Cir. 1968), certiorari denied,

394 U.S. 965 (1969); *Silber v. Dickson*, 403 F. 2d 642 (9th Cir. 1968).

This Court has uniformly given the protection of unqualified executive immunity to a governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders to accomplish that end. In dissenting below, Judge Celebrezze conceded:

"The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive, and in and of itself is not subject to judicial review.

***With respect to Section 1983 claims, Governor Rhodes' decision to order the National Guard to duty on the Kent State Campus, therefore, could not have been reviewed as a basis for liability." (Sch. Pet. 69a)

Judge Celebrezze was unwilling to concede that the same unqualified executive immunity extended to Governor Rhodes with respect to such additional allegations of the *Scheuer* complaint as that he "engaged in rhetoric and gave Ohio National Guard officers orders which substantially increased the risk of unnecessary violence", and the like. (Sch. Pet. 87a) As has been pointed out *supra*, the district court was under no obligation to accept such allegations as true to the extent they were rebutted by facts of which the court took judicial notice. Similarly, the courts below judicially noticed rebutting laws of Ohio and the United States with respect to training, weaponry, discipline and call-up of the Ohio National Guard.

Like the instant cases, *Moyer v. Peabody*, 212 U.S. 78 (1909) was an action brought under the Civil Rights Act to recover damages from a former Governor (of Colorado) for trespass against the plaintiff. The complaint was dismissed on demurrer. Certiorari was denied and this court speaking by Justice Holmes, said in part:

"As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication [imprisonment ordered below in this case]." *Moyer v. Peabody*, 212 U.S. 78 at p. 85.

In determining whether it had before it unrebutted allegations that Respondent, Governor James Rhodes, had taken discretionary actions outside the scope of his office or in abuse of his office that deprived the decedents of the plaintiffs below of federally protected constitutional rights, the District Court had before it, incorporated into the various motions to dismiss therein filed, the text of the official gubernatorial proclamations of April 29, 1970, and May 5, 1970, each reciting (to quote the April 29 language):

"I, James A. Rhodes, Governor and Commander-in-Chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent necessary to determine the objects to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in time of public danger." (Sch. Pet. 24.)

The wrongful death claims asserted in the district court in the within cases, based on diversity jurisdiction (28 U.S.C. §1332), are subject to the same rebuttal arising out of Eleventh Amendment immunity to suit as has thus far been discussed herein with respect to the 42 U.S. Code §1983 actions. To minimize repetition, the arguments therefor are referred to and adopted. Moreover, under the rule of *Erie Railroad Company v. Tompkins*, 394 U.S. 64 (1938) and the provisions of 28 U.S. Code 1652, the federal courts in Ohio must follow Ohio's immunity to suit under its own Constitution (Constitution of the State of Ohio, Article I, Sec. 16) and its own case law.

Respondent Governor James Rhodes also refers to and adopts the argument with respect to diversity jurisdiction contained in the Brief on the Merits filed in this Court by the other Respondents.

Brief mention must be made of the contention in the complaints below that the State of Ohio had waived sovereign immunity by enactment of Sec. 5923.37, Ohio Revised Code.

Respondent Governor James Rhodes was not encompassed by the language of the statute as he is not a "member of the organized militia—ordered to duty by state authority during a time of public danger", but was, instead, the constitutionally appointed commander-in-chief of the organized militia and by virtue thereof, the arm of the state in summoning it to duty.

The *Krause-Miller* brief is intemperate in tone and marred by intrusions of so-called "facts" that, if they exist at all, are extraneous to the record. Such allegations

are undocumented, unsworn, and, but for the experience of the members of this Honorable Court, could be considered inflammatory.

Both the district court and the majority in the Sixth Circuit recognized that allegations in all the complaints were extravagant and conclusionary, and that they did not square with facts judicially noticed. In this Court, the *Scheuer* brief has retreated somewhat from the extravagances of the *Scheuer* complaint, but the *Krause-Miller* brief has achieved a new level of passion that leaves the *Krause* and *Miller* complaints looking insipid by contrast. A fair sample of the *Krause-Miller* language is this excerpt (in bold face type) taken from page 59 of the *Krause-Miller* brief:

"Petitioners urge upon this court that the atmosphere and climate of May 4, 1970, was rife with political passion. The Governor, on the night prior to the shooting, held a public press conference in which extreme and intemperate statements were made by him on the scene of Kent, Ohio, in the presence and knowledge of the generals and troops. The Governor was personally present in command of these troops, working them up to a passionate frenzy in order, as petitioners contend, to achieve his personal political goals. Petitioners have alleged in substance, that the actions of this Governor, including the various orders he gave personally at the scene and elsewhere, individually and in conspiracy with others, directly resulted in the deaths of four innocent students. Petitioners state unabashedly that the Governor was dishonest in his motives and unconstitutional in his actions. The Civil Rights Act was designed to reach this extreme kind of unconstitutional violation. Nothing could be more essential to the individual in the protection of his constitutional rights than his right to life—particularly where the use of military forces is involved. This court cannot resolve the issues regarding executive immunity, which are

premised upon policy considerations, without reference to the factual context in which this tragedy occurred. (Kr. Br. 59-60.)

The Krause-Miller brief also attacks the proclamations attached to the Motions to Dismiss filed by Respondent Governor James Rhodes and purports to find the proclamation of April 29, 1970, to encompass only disorders arising from wild-cat strikes in the truck transportation industry. Careful readers will note that the reference to the problems in the truck transportation industry occur only in the "whereas" clauses, which introduce the Governor's order. The "order" part of the proclamation makes crystal clear that Respondent Governor James Rhodes ordered into active service "such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio." (App. 30) The supplementary proclamation issued on May 5, 1970, discloses that on April 29, prior to the issuance of the proclamation of the same date, Respondent Governor James Rhodes, in the exercise of his constitutional office as Commander-in-Chief, by verbal orders issued to the Adjutant General, directed the call-up of

"such units of the Ohio National Guard as in his judgment might be necessary or desirable to meet disorders and threatened disorders relating to wild-cat strikes in the truck transportation industry and to meet disorders or threatened disorders on campuses of Ohio State University in Franklin County and campuses of other state-assisted universities." (App. 32.) The May 5 proclamation further explains that "pursuant to the verbal orders aforementioned, the Adjutant General of Ohio called to active service units of the Ohio National Guard and assigned them variously to service in the City of Kent and on the campus of

Kent State University in Portage County, and on the campus of Ohio State University in Franklin County, in addition to divers specific assignments related to restoration of order in the truck transportation industry." (App. 32; text corrected to follow the original on file in the Office of Secretary of State of Ohio.)

The obvious conclusion to be drawn from the fact that a supplementary proclamation was issued to flesh out the first is that, to avoid exacerbating campus turmoil (by students and campus hangers-on), Governor Rhodes prudently gave the Adjutant General the authority he needed to meet threatened disorders, but did not, at the same time, by specific reference to Kent State, give an excuse to trouble-makers to increase their efforts to foment action in the streets. Both proclamations were from the hand of Respondent Governor James Rhodes, who, at the start of his second term, bound himself by his oath of office to support the Constitution of the United States and the Constitution of the State of Ohio, and faithfully to execute the laws.

The *Krause-Miller* brief further seeks to show, by picking words out of context, that the April 29, 1970 proclamation did not follow the language of §5923.22 of the Ohio Revised Code, which defines the occasions for use of the Ohio National Guard. If counsel will but look, and read the relevant words, separated from compound phrases, in the order in which written, counsel will see that all of the words required by Section 5923.22, O.R.C., are there:

"WHEREAS, in northeastern Ohio⁴, * * * and in other parts of Ohio * * * there exist unlawful assemblies and * * * bodies of men acting with intent to commit felony and to do violence to persons or property in disregard of the laws of the State of Ohio and the United States of America * * *."

4. Portage County is in northeastern Ohio.

The April 29, 1970 proclamation of Respondent Governor James Rhodes was prudently drawn to have the necessary legal consequences (including "to prevent a riot or insurrection"), to reassure and calm the citizenry, and to avoid increasing the anger and threat of any existing disorders.

If their position were better supported by reason and logic, the authors of the *Krause-Miller* brief would not feel impelled to shout so loudly and to berate so unmercifully. Understanding this, Respondent Governor James Rhodes does not formally invoke action by this Court under its Rule 40(5), although most of pages 59-65 of the *Krause-Miller* brief offend against its prohibitions.

The *Krause-Miller* brief also seeks to show that this Court's decisions in *Moyer v. Peabody*, 212 U.S. 78 (1909) and *Sterling v. Constantin*, 287 U.S. 378 (1932) are distinguishable and therefore inappropriate as precedents. *Moyer*, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former Governor of Colorado for an asserted trespass. It is discussed, *supra*, in connection with the *Scheuer* brief.

The *Krause-Miller* brief would distinguish the *Moyer* case on its facts, specifically, that in *Moyer*, a state of insurrection existed and that the Governor of Colorado acted "in good faith." The asserted grounds of distinction are of no significance. First, there is no requirement that the Governor of Ohio be faced by insurrection before he can call up the Ohio National Guard. With the relevant portions in italics, §5923.21 of the Ohio Revised Code reads as follows:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

In addition, §5923.22 of the Ohio Revised Code, provides in relevant part:

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or to offer violence to person or property, or by force and violence break or resist the laws of the state, the commander-in-chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities. * * *"

The Governor of Ohio also has power, pursuant to §5923.21 of the Ohio Revised Code, to order the Ohio National Guard to execute the laws and to keep the peace in a designated area. This was done by his proclamation of April 29, 1970. It was filed with the district court as an attachment to the Motion to Dismiss in each of the cases.

In Part I of this Argument, Respondent Governor James Rhodes has dealt with the contention that on his Motions to Dismiss, under the facts of these cases, the district court was under no obligation to take the extravagant and unbelievable allegations of the complaints as true. Such unbelievable allegations do nothing to rebut the presumption of validity and good faith that inheres in an official act by the chief executive of a state within the scope of his office as defined by the Constitution and laws of his state in the absence of any showing that he has lost his powers through impeachment and removal from office.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this Court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved *Moyer v. Peabody*, *supra*, in these words (Chief Justice Hughes, at page 399):

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402.)

III. UNDER THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE DISTRICT COURT LACKED JURISDICTION OF THE SUBJECT MATTER OF THE KRAUSE, MILLER AND SCHEUER COMPLAINTS.

It should be observed at the outset that the asserted violations of 42 U.S.C., §1983, are set forth in each of the complaints below as giving rise to a claim for payment of money to the Administrators of the respective estates of the decedents whose civil rights are claimed to have been violated. The amounts demanded, both individually and jointly from Respondent Governor James A. Rhodes, aggregate \$4,000,000.00 in compensatory damages and \$7,000,000.00, plus such additional amount as the Court might find appropriate in the *Scheuer* case, as punitive damages. The emphasis in the three complaints, then, is on punishment.

It also should be noted at the outset that each of the complaints is titled as one against Respondent Rhodes in his official capacity. The *Scheuer* complaint sued "James Rhodes, Governor of the State of Ohio." The *Krause* complaint sued "Governor James Rhodes, Governor of the State of Ohio, et al." The *Miller* complaint went straight down the middle and sued, "James Rhodes,

individually and as Governor of the State of Ohio —." Thus, two of the complainants below were sure, and one was half-sure, that his action was properly brought against the Governor of the State of Ohio, the Chief Executive of the State, and the official who, by force of the Ohio Constitution, is Commander-in-Chief of the Ohio National Guard.⁵

In the district court, Respondent Rhodes, by his motions to dismiss in the *Krause*, *Miller* and *Scheuer* cases, raised the question that the court lacked jurisdiction of the subject matter of each action. Similar motions were filed in behalf of the other respondents. Thus, the issue of Eleventh Amendment immunity has been asserted throughout this litigation and is again asserted by all respondents in this Court. Respondent Rhodes refers to and adopts the argument on this issue presented in the separate brief filed by Charles E. Brown, Robert F. Howarth, Jr., and William W. Johnston for the other defendants-respondents herein. That brief develops in detail the doctrine of sovereign immunity as applied to the facts in these cases. It stresses and documents that the immunity of a state to suit by citizens of another state cannot be by-passed by naming personal party-defendants when the action essentially affects the state. While it must be acknowledged that this Court has, on occasion, appeared to depart from this doctrine, it seems never to have done so in any action where the relief sought would diminish the revenues of the state or interfere with the exercise of any essential state government function on a par with the protection of its citizens against disorder, violence, and riot.

5. Article III, §10, Const. of the State of Ohio: "He [the Governor] shall be Commander-in-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States."

Counsel for the complainants below have placed great reliance on *Ex Parte Young*, 209 U.S. 123 (1908), with the *Krause-Miller* brief interpreting it as holding that the immunity of a state provided in the Eleventh Amendment does not extend to a state official charged with violating the Federal Constitutional Rights of citizens. However, *Ex Parte Young* lays down a principle so much narrower than asserted that the Sixth Circuit Court of Appeals correctly found the case to be "inapposite". (Sch. Pet. 12a.) What *Ex Parte Young* stands for is that

"* * * individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and who are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." *Ex Parte Young*, 209 U.S. 123 at 155.

As Chief Judge Weick observed in the Court of Appeals opinion below, "*Ex Parte Young* — was an action for injunction —. Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and protect the public." (Sch. Pet. 12)

The *Scheuer* argument with respect to Eleventh Amendment immunity begins by asserting that the Eleventh Amendment has no role in suits seeking damages from persons who also happen to be state officials. That glosses over the threshold question of whether the act claimed to have given rise to a right to damages was a *personal* act of an official or an *official* act. Appointing a department head, or an adjutant general or calling out the National Guard cannot be a personal act. It can only be an official act.

The *Scheuer* argument also contends that a suit for money damages for abuse of office is possible under 42 U.S.C., §1983, only because the holding of a governmental office is requisite to supply the ingredient of "state action" thereby turning conduct merely tortious into deprivation of constitutional right. The point is not made that easily, for it pays too little attention to the force of Sec. 1983's words, "under color of any statute, — custom or usage of any state —". Given the ordinary meaning of the words, that phrase requires that the person sought to be charged shall have *pretended* to draw his authority to act from the statute, custom or usage. Thus, there could clearly be a cause of action under §1983, where an imposter, *pretending* to be a state officer, put forces in motion that deprived a complainant of some federally-protected Constitutional right. Similarly, a governor who had been advised by his Attorney General that an act of the legislature was unconstitutional would have difficulty in explaining that he was not *pretending* to act with proper authority in enforcing the act. It is this second category toward which the complaints below were directed in their extravagant and unbelievable allegations that Respondent Rhodes intentionally, wantonly and recklessly ordered National Guard troops to shoot and kill innocent students. However, as was pointed out in Part I of this Argument, the Court was not bound to accept or believe such allegations when, of its own knowledge, it knew that the Governor is sworn to uphold the Constitutions of the United States and of Ohio and that he had facts before him on which, acting in good faith, he could make the judgments and issue the orders complained of in the District Court.

The *Scheuer* brief further contends that the Eleventh Amendment today has to be regarded as modified by the Fourteenth Amendment so as to permit redress against an officer of a state for deprivation of constitutional

rights, and that even if no remedy has been provided, the Court, if it feels a sufficient sense of outrage, can invent one. Such a sense of outrage was felt in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Justice Brennan wrote the decision for five members of the Court, and Justice Harlan concurred. Chief Justice Burger dissented as did Justice Black and Justice Blackmun. Notable is the fact that the case involved a claimed deprivation of federally-protected rights by officers of the Federal government. The case in no way touches the doctrine of federalism nor does it in any way involve the Eleventh Amendment. Moreover, this Court during its most recent term restated the continuing validity of Eleventh Amendment (sovereign) immunity.⁶

The main argument of the *Krause-Miller* brief on Eleventh Amendment immunity, is that this Court has, in the past, held that a suit against state officials is not a suit against the state and therefore is not prohibited by the Eleventh Amendment and, further, that if under the facts of the instant case, it still should be deemed directed against the state, relief should be granted because the Fourteenth Amendment cannot be negated by the Eleventh Amendment. Further, the *Krause-Miller* brief asserted that Justice Brennan has shown how to harmonize the Eleventh Amendment and the Fourteenth Amendment in *Perez v. Ledesma*, 401 U.S. 82 (1971) (Kr. Br. 38); that Sixth Circuit Judge O'Sullivan just doesn't like the Civil Rights Act (Kr. Br. 39); that the State of Ohio has immunized itself against suit in its own courts (Kr. Br. 40); that the actions of the courts below effectively destroy 42 U.S.C. §1983 (Kr. Br. 45);

6. A state is immune to suit even by its own citizens, absent consent to be sued. *Employees v. Missouri Public Health Dept.* 36 L. Ed. 2d 251 (1973).

that judgment for the complaints below would not touch the state Treasury (Kr. Br. 51) and that in fact, many of the defendants-respondents are no longer officers of the state (Kr. Br. 40).

The *Krause-Mil'ler* argument on the issue of Eleventh Amendment immunity is answered in detail in the brief of the other Respondents herein. It cannot escape notice that the *Krause-Miller* brief seeks to swell the impact of its argument by use of words heavily laden with emotion. Consider, for example, this selection from the Eleventh Amendment argument:

"If state officials, acting under color of state law, can individually and in conspiracy, illegally, wantonly, intentionally, shoot and kill a student on a college campus without any justification whatsoever, and thereafter be entitled to claim immunity from any redress in a federal court for the wrong allegedly committed, then the guarantees of due process and equal protection in the Fourteenth Amendment are meaningless and inoperative statements which exist only on a piece of paper." (Kr. Br. 53).

It seems pertinent to observe again that the "victims" are deceased and the claims are for money sought both as compensatory and punitive damages. Moreover, the *Krause-Miller* argument ignores the customary way in which the State of Ohio deals with moral claims. That is through filing and processing a claim through the Sundry Claims Board, and obtaining its inclusion and passage in a Sundry Claims Bill. Such an approach, however, would not serve one of the manifest purposes of this litigation, one which appears to be much stressed in some of the briefs *amici curiae* filed herein, namely, to change the relationships between the federal government and the states by opening a clear path for civil rights actions under the aegis of 42 U.S.C., §1983.

The *Krause-Miller* brief concludes its argument against recognizing the applicability of Eleventh Amendment immunity to these cases by implying that this Court would be false to its traditions if it did not equate the instant cases with landmark civil rights decisions of recent decades, and, if necessary, "fashion a remedy". Such a suggestion is particularly dangerous when it invites this Court both to assume legislative functions and to make frontal attack upon the doctrine of federalism. Surely this Court will see, as the courts below have seen, that preserving public order within a state is an essential governmental function, that acts in furtherance of and directed toward such preservation of public order are official acts, and, being official, are acts of the state and have the protection of Eleventh Amendment immunity.

The *Krause-Miller* brief quotes at length from *Sterling v. Constantin* without indicating the distinct difference in facts between that case and the *Krause-Miller-Scheuer* cases. In *Sterling*, the Governor had declared martial law and superseded the function of civil authorities so far as they related to administration of oil production quotas. In the instant cases, the National Guard was ordered to aid civil authorities, not to displace them. The brief *amicus curia*, tendered by David E. Engdahl, Esq., in behalf of various church groups, also urges that *Sterling v. Constantin* reinterpreted *Moyer v. Peabody* and limited the executive immunity of the governor to acts "which are judicially found in retrospect to have been directly related to a lawful mission * * *". However, Chief Justice Hughes, in *Sterling* (at page 400), in referring to the *Moyer* case, said:

"In that case, it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the

opinion must be taken in connection with the point actually decided."

The same admonition is relevant to those who would extend the ruling in *Sterling v. Constantin* and urge that it reverses *Moyer*. The point of the case was described by Chief Justice Hughes:

"Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection, of tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil." *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

The *Krause-Miller* brief, also, by misconstruing the sense of one of Judge Weick's pronouncements, misrepresents the import of the Sixth Circuit majority's discussion of the doctrines of legislative and judicial immunity, companions to executive immunity. The *Krause-Miller* brief quotes and expands upon Judge Weick's words as follows:

" 'and since the courts have granted to themselves absolute immunity, it would seem incongruous for them *not to extend the same privilege* to the executive.' (Emphasis added.)"

"Thus it would appear that the logic of the lower Court's reasoning leads to an 'extension' of the immunity doctrine to the executive. This Court, for several reasons, should not affirm such an 'arbitrary extension.'" (Kr. Br. 70.)

"Moreover, such an 'extension of immunity to the executive would leave a citizen without any redress for violation of federal constitutional rights —.'" (Kr. Br. 70.)

"In summary, there is absolutely no justification for this Court to extend the legislative and judicial immunities under the Civil Rights Act to include the executive branch of the government." (Kr. Br. 75.)

A reading of Judge Weick's words in more complete context makes clear that he did not use the word "extend" to signify "enlarge the scope of" but only in the sense of "recognize", "acknowledge", or "concede":

"Although occasionally both legislators and judges have been charged with depriving individuals of their constitutional rights, they have unquestioned immunity from suit. *Gregoire v. Biddle, supra*, and *Barr v. Matteo, supra*, applied the immunity to the Executive Department for the same reasons that it was extended to legislators and judges. The Executive Department is charged with the duty of protecting not only the other two departments of government, but also the general public from domestic as well as foreign enemies. Such protection is the highest duty the Executive Department is obligated to perform. [Footnote: As well stated by Mr. Justice White, "The most basic function of any government is to provide for the security of the individual and of his property." *Miranda v. Arizona*, 384 U.S. 436, 539 (1966), White, J. dissenting.]

It would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court, in a multitude of protracted actions, because he called out troops to suppress riots or disorders which resulted in injury. It would surely take a hardy executive to exercise his discretion by calling out troops to suppress a riot or insurrection, if he knew that in so doing the wisdom of his action could later be challenged in the courts. And since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend [concede] the same privilege to the Executive."

"To place a straight-jacket on the state's Chief Executive in times of emergency so that he could not freely exercise his discretion, would indeed stop the state

government 'in its tracks'. *Dugan v. Rank*, *supra*, at 621; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 at 704 (1949); *Ogletree v. McNamara*, 449 F. 2d 93 (6th Cir. 1971)."

In 1959, this Court decided *Barr v. Matteo*, 360 U.S. 564, 3 L. Ed. 2d, 1434, 79 Sup.Ct. 1335. The case was one in which the Director of the Office of Rent Stabilization was sued for libel for statements in a press release. The majority opinion was written by Justice Harlan who cited as precedent *Spalding v. Vilas*, 161 U.S. 483, 40 L. Ed. 780, 16 Sup. Ct. 631, and *Gregoire v. Biddle* (C.A. 2 N. Y.) 177 Fed. 2d 579, 581. In the latter case, Judge Learned Hand pointed out that an official who uses his powers to injure another should not escape liability but that it is impossible to know whether a claim for money damages is well founded until the case has been tried, so that

"to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again, the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed, be means of punishing public officers who have been truant to their duties, but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. * * * what is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him —." 177 Fed. 2d 579, 581.

Following his reference to Judge Learned Hand's opinion, Justice Harlan considered the scope of executive

immunity and concluded that absolute immunity, usually thought of as pertaining only to executive officers of top rank, is more properly related to the scope of the official's responsibilities, duties and discretion. He wrote:

"To be sure, the occasions upon which the acts of a head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and the wider the scope of discretion, it entails." *Barr v. Matteo*, 360 U.S. 564, 573.

The *Krause-Miller* brief spends much time and effort seeking to demonstrate that *Barr v. Matteo*, *supra*, and *Gregoire v. Biddle*, *supra*, were poorly reasoned in the first place, are replete with dicta, and can have no applicability to the instant cases because neither *Barr* nor *Gregoire* was brought under the Civil Rights Act. The reasoning of the cases nevertheless, seem sound.

A Governor of Ohio, under the law in force in 1970 and currently in force, clearly has the responsibility and the discretion to determine when it is appropriate to call the National Guard to aid civil authorities. He uses troops trained and equipped in accordance with the requirements of federal law. He leaves tactical decisions as to choice of units and their deployment to the judgment of the Adjutant General and the Assistant Adjutant General, both of whom he has appointed, and both of whom have been trained pursuant to federal directives. If, despite the built-in precautions, a mistake is made (a point on which consensus is often impossible to reach), the courts should not second-guess the Executive decision. Where civil rights are involved and life is lost, particularly young life, the impulse is strong to adopt a rationale that will match the emotional need for someone in society

to make amends for society as a whole. Unfortunately, in an age that has left behind animal sacrifices to the gods, symbolic expiation can be accomplished only at the cost of counter injury to persons or to institutions. On balance, it seems wiser to protect our institutions of government and the frail mortals who make government work and to leave moral claims to be settled through the workable, though not completely satisfactory, procedure of sundry claims processed through the mechanisms provided therefor in the Executive and Legislative Branches.

IV. THE KRAUSE, MILLER, AND SCHEUER COMPLAINTS, TO THE EXTENT THEY CHARGE IMPROPER TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD, RAISE POLITICAL QUESTIONS THAT ARE NOT JUSTICIABLE.

After the filing of the Petitions for Certiorari herein, this Court, on June 21, 1973, decided *Gilligan v. Morgan*, ____ U.S. ____, 37 L. Ed. 2d 407, 93 Sup. Ct. _____. The action, brought by students at Kent State University, among other things, asked for injunctive relief to prevent the Ohio National Guard, in the future, from violating the constitutional rights of the plaintiffs and members of their class. The complaint was dismissed by the District Court for failure to state a claim upon which relief could be granted. The Court of Appeals for the Sixth Circuit affirmed the dismissal with respect to most of the relief sought, but remanded the case to the District Court with directions to resolve the following question:

"Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that non-

lethal force would suffice to restore order and the use of lethal force is not reasonably necessary?:

This Court granted certiorari to review the action of the Court of Appeals. Between the time of the filing of the complaint and the argument in this Court, the terms of all the officers expired, all the students who were plaintiffs left school, and the Ohio National Guard adopted new "use-of-force" rules and installed new training for civil disorder control.

Chief Justice Burger wrote an opinion expressing the view of five members of the Court, declining to use mootness as the basis of their decision. The majority then ruled that the Constitution of the United States empowered Congress to provide for organizing, arming and disciplining the militia, reserving certain responsibilities to the state; that Congress has authorized the President to prescribe regulations governing the organization and discipline of the National Guard; and that the relief sought in the action is of such nature as to render the claims and proposed issues on remand non-justiciable. Justices Blackmun and Powell concurred on the grounds that the case presented inappropriate subject matter for judicial consideration. Justices Douglas, Brennan, Stewart and Mashall joined in asserting that the case should be dismissed as moot.

Although the relief sought in *Gilligan v. Morgan, et al.* was prospective in nature, it called for the same sort of judicial determination sought retroactively in the instant cases. It is submitted, therefore, that to the extent the instant cases require an evaluation of training, arming and procedures of the Ohio National Guard, they raise political questions that are not justiciable.

The *Scheuer* brief herein seeks to narrow the scope of the opinion in *Gilligan v. Morgan* and to show that it has

no application to an action for damages. That was not decided in the case. Being scrupulously correct, the Court simply observed in *Gilligan* that the case was not one in which damages were sought.

V. THE ALLEGATIONS IN THE KRAUSE AND MILLER COMPLAINTS THAT TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD WERE IMPROPER INDISPENSABLY REQUIRE JOINDER OF THE UNITED STATES OF AMERICA AS A PARTY-DEFENDANT.

Speaking for the majority in the Sixth Circuit consideration of these cases, Judge Weick stated:

"It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12b and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the training and weaponry of the Guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the Court. The United States has not consented to be sued." (Sch. Pet. 19.)

In the view of Petitioners, Judge Weick wrongly concluded that because of the involvement of the United States in the training of the National Guard, the United States was required to be named a defendant. Petitioners' theory is that inasmuch as Petitioners did not state in their complaints that the United States government or federal officials were involved, as stated by Judge Weick, there is no way to arrive at the conclusion that they were in fact so involved. Such a notion ignores Article I, Sec. 8,

Clause 16, of the United States Constitution, which, after providing that Congress shall have power to provide for the organizing, arming, disciplining and governing of the militia, reserved to the states the appointment of officers and the "authority of training the Militia according to the discipline prescribed by Congress." It likewise ignores relevant provisions of Title 32, United States Code: Section 108, providing that a state that does not comply with Title 32 shall lose its National Guard money; Section 110, providing that the President shall be the source of regulations and orders to organize, discipline and govern the National Guard; Section 501, providing that the discipline and training of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force.

Rule 19(a), Fed. R. Civ. P., states in pertinent part:

"A person * * * shall be joined as a party in the action if * * * he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may * * * leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party."

Rule 19(b) provides in pertinent part:

"If a person as described * * * cannot be made a party, the court shall determine whether in equity and good conscience the action * * * should be dismissed, the absent person being thus regarded as indispensable. * * *"

The provisions of the United States Constitution, Title 32 of the United States Code, and the Federal Rules of Civil Procedure are all matters of which the court takes

judicial notice. The court likewise notes that the United States government, which is so intricately interwoven in the training, arming and discipline of the Guard, is indispensably a party and has not consented to be sued. Under the circumstances, Judge Weick reached the only possible conclusion, namely, he required dismissal of the actions.

When Petitioners assert that "any bar to this action premised upon the failure of the United States to consent to suit violates the due process and equal protection clauses of the XIV Amendment", they are arguing in a circle. What they are saying is that it is unconstitutional under the XIV Amendment for the sovereignty created by the United States Constitution to possess one of the attributes of sovereignty, namely, an immunity to suit in its own courts.

CONCLUSION

For the reasons herein given, this Court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit that, in turn, affirmed the dismissal of the *Krause*, *Miller* and *Scheuer* complaints by the United States District Court for the Northern District of Ohio, Eastern Division.

Respectfully submitted,

R. BROOKE ALLOWAY,
Counsel of Record

JOHN M. McELROY,
Of Counsel

17 South High Street
Columbus, Ohio 43215

Attorneys for Respondent
James A. Rhodes

FILED
OCT 10 1973

RECEIVED DEPT. OF JUSTICE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973
No. 72-914

SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,
Petitioner,

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, Various Officers and Enlisted Men,
and ROBERT WHITE,

Respondents
AND

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased,
Petitioner,

GOVERNOR JAMES RHODES, SYLVESTER DEL
CORSO and ROBERT CANTERBURY,
and
Respondents,

ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased,
Petitioner,

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, ALEXANDER STEVENSON AND
VARIOUS OFFICERS AND ENLISTED MEN AND
ROBERT WHITE,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT
BETWEEN RESPONDENTS DEL CORSO, CANTERBURY,
JONES, MARTIN, SRP AND WHITE

(Continued Inside Front Cover)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES	4
STATEMENT OF CASE	11
SUMMARY OF ARGUMENT	13
ARGUMENT	14
I. The Lower Court Properly Considered the Complaints' Allegations	14
A. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ. P., motion to dismiss?	15
B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ. P., motion to dismiss?	17
II. The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted	22
A. Respondent, Governor James A. Rhodes.	22
1. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts vis-à-vis a 42 U.S.C. Section 1983 cause of action?	22
2. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts vis-à-vis a wrong- ful death cause of action brought under diversity jurisdiction?	25
B. The Remaining Respondents	25
1. Under the facts of this case, do the President of Kent State University,	

	<i>Page</i>
the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess <i>qualified</i> executive immunity <i>vis-à-vis</i> a 42 U.S.C. Section 1983 cause of action? _____	25
2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess <i>qualified</i> executive immunity <i>vis-à-vis</i> a wrongful death action brought under diversity jurisdiction? _____	36
III. The Trial Court Lacked Subject Matter Jurisdiction _____	38
A. Petitioners' Title 42 U.S.C. §1983 Causes of Action; Title 28 U.S.C. §§1331, 1343 _____	38
B. Petitioners' Wrongful Death Causes of Action; Title 28 U.S.C. §1332. _____	61
C. Section 5923.37, Ohio Revised Code. _____	64
IV. The Allegations of Petitioners' Complaints Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Justiciable Political Questions. _____	66
V. The Federal Government Is An Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard. _____	74
CONCLUSION _____	76
CERTIFICATION OF SERVICE _____	77

TABLE OF AUTHORITIES

CASES

<i>Adams v. Nagle</i> , 303 U.S. 532 (1938) _____	45
<i>Adams v. Pate</i> , (7th Cir., 1971) 445 F.2d 105 _____	35, 37

	Page
<i>Anderson v. Nasser</i> , (5th Cir. 1971) 438 F.2d 183	28
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	54, 66, 67
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959)	28, 31, 32, 35, 49, 50, 64
<i>Beauregarde v. Wingard</i> , (S.D. Cal. 1964) 230 F.Supp. 167	32
<i>Birnbaum v. Trussell</i> , (2nd Cir. 1965) 347 F.2d 86	26, 27
<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971)	59
<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> , (2nd Cir. 1972) 456 F.2d 1339	28, 32
<i>Blackburn v. Fisk University</i> , (6th Cir. 1971) 443 F.2d 121	21
<i>Blitz v. Boog</i> , (2nd Cir. 1964) 328 F.2d 596, cert. denied, 379 U.S. 855 (1965)	29
<i>Board of Liquidation v. McComb</i> , 92 U.S. 531 (1876)	45
<i>Bradford Audio Corporation v. Pious</i> , (2nd Cir. 1968) 392 F.2d 67	28
<i>Brownfield v. Landon</i> , (D.C. Cir. 1962) 307 F.2d 389, cert. denied, 371 U.S. 924 (1962)	29
<i>Carolina Glass Co. v. South Carolina</i> , 240 U.S. 305 (1916)	42
<i>Carter v. Carlson</i> , (D.C. Cir. 1971) 447 F.2d 358, rev'd, 409 U.S. 418 (1973)	26, 59
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 257 (1821)	38
<i>Cooper v. O'Conner</i> , (D.C. Cir. 1938) 99 F.2d 135, cert. denied, 305 U.S. 643 (1938)	29
<i>Dalehite v. United States</i> , 346 U.S. 15 (1953)	28, 38
<i>David v. Cohen</i> , (D.C. Cir. 1969) 407 F.2d 1268	28
<i>District of Columbia v. Carter</i> , 409 U.S. 418 (1973)	26, 58
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963)	38, 40, 46, 52, 74
<i>Duhne v. New Jersey</i> , 251 U.S. 311 (1919)	39
<i>Duncan v. Kahanamoku</i> , 327 U.S. 304 (1946)	54, 55
<i>Dunham v. Crosby</i> , (1st Cir. 1970) 435 F.2d 1177	35, 37
<i>Egan v. City of Auroa</i> , 365 U.S. 514 (1961)	40
<i>Employees v. Missouri Public Health Dept.</i> , — U.S. —, 36 L.Ed.2d 251 (1973)	39, 52, 56, 57, 58, 66
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	62

	Page
<i>Ex parte Ayers</i> , 123 U.S. 443 (1887)	40, 42, 47
<i>Ex parte New York</i> , 256 U.S. 490 (1920)	38, 39, 40, 42, 51
<i>Ex parte Virginia</i> , 100 U.S. 339 (1880)	27
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	52, 53, 54, 55, 57
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	66
<i>Ford Motor Co. v. Treasury Department</i> , 323 U.S. 459 (1944)	40, 42, 51, 64
<i>Franklin v. Meredith</i> , (10th Cir. 1967) 386 F.2d 958 ..	28
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	32
<i>General Oil Co. v. Crane, Inspector of Coal Oil</i> , 209 U.S. 211 (1908)	54
<i>German Bank v. United States</i> , 148 U.S. 573 (1893) ..	35
<i>Gidley, Executor of Holland v. Lord Palmerston</i> , 3 B & B. 275 (1822)	30
<i>Gilligan v. Morgan</i> , ... U.S. ..., 37 L.Ed. 2d 407 (1973)	54, 66, 67, 68, 70, 72, 73, 74
<i>Governor v. Madrazo</i> , 26 U.S. (1 Pet.) 73 (1828)	40
<i>Great Northern L. Ins. Co. v. Read</i> , 322 U.S. 47 (1944)	42, 47, 64
<i>Gregoire v. Biddle</i> , (2nd Cir. 1949) 177 F.2d 579, cert. denied, 339 U.S. 949 (1950)	29, 32, 33, 35, 48, 50, 64
<i>Gregory v. Small</i> , 39 Ohio St. 346 (1883)	25, 28, 38
<i>Griffin v. School Bd. of Prince Edward</i> , 377 U.S. 218 (1964)	54
<i>Hagood v. Southern</i> , 117 U.S. 52 (1886)	42
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1889)	39, 56
<i>Harnis v. Kerner</i> , 404 U.S. 519 (1972)	67
<i>Hiland Dairy, Inc. v. Kroger Co.</i> , (C.A. 8th 1968) 402 F.2d 968, cert. denied, 395 U.S. 961 (1968)	19
<i>Hoffman v. Halden</i> , (9th Cir. 1959) 268 F.2d 280	28, 34, 35
<i>Howard v. Lyons</i> , 360 U.S. 593 (1959)	28
<i>International Bk. of M. v. Banco de Economics y Prestamos</i> , 55 F.R.D. 180 (1972)	19
<i>Interstate Nat. Gas Co. v. Southern California Gas Co.</i> , (9th Cir. 1953) 209 F.2d 380	21
<i>Jobson v. Heine</i> , (2nd Cir. 1966) 355 F.2d 129	26

	Page
<i>Jones v. Kennedy</i> , (D.C. Cir. 1941) 121 F.2d 40, cert. denied, 314 U.S. 665 (1941)	29, 35
<i>Jones v. Perrigan</i> , (6th Cir. 1972) 459 F.2d 81	26
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	56, 57, 58
<i>Kawananakoa v. Polyblank</i> , 205 U.S. 349 (1907)	65
<i>Kelley v. Dunne</i> , (1st Cir. 1965) 344 F.2d 129	32, 33
<i>Kendall v. Stokes</i> , 44 U.S. (3 How.) 506 (1845)	28, 29, 31
<i>Krause, Admr. v. Ohio</i> , 31 Ohio St. 2d 132, 285 N.E.2d 736, appeal denied, 34 L.Ed.2d 506 (1972); pet. for reh. denied, 35 L.Ed.2d 280 (1973)	60, 62, 65
<i>KVOS, Inc. v. Associated Press</i> , 299 U.S. 269 (1936)	15
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	55
<i>Land v. Dollar</i> , 330 U.S. 731 (1946)	14, 47, 75
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1939)	51
<i>Larson v. Domestic and Foreign Commerce Corp.</i> , 337 U.S. 682 (1948)	40, 42, 43, 45, 46, 75
<i>Lee Turzillo-Contr. Co. v. Cincinnati Met. Hous.</i> Auth., 10 Ohio St.2d 5, 225 N.E.2d 255 (1967)	64
<i>Louisiana v. Jumel</i> , 107 U.S. 711 (1883)	42
<i>Louisiana, ex rel. New York Guaranty and Indem.</i> <i>Co. v. Steele</i> , 134 U.S. 230 (1890)	42
<i>Lumbermens Mutual Casualty Company v. Rhodes</i> , (10th Cir. 1968) 403 F.2d 2, cert. denied, 394 U.S. 965 (1969)	28
<i>Luther v. Borden</i> , 48 U.S. (7 How.) 581 (1849)	23, 24, 35, 51
<i>Malone v. Bowdoin</i> , 369 U.S. 643 (1962)	40, 41
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch.) 69 (1803)	59
<i>Martin v. Mott</i> , 25 U.S. (12 Wheat.) 537 (1827)	23, 24, 35
<i>Martone v. McKeithen</i> , (5th Cir. 1969) 413 F.2d 1373	25, 28, 32
<i>Maryland v. United States</i> , 381 U.S. 41 (1965)	37
<i>McLaughlin v. Tilendis</i> , (7th Cir. 1968) 398 F.2d 287	26
<i>McNutt v. General Motors Accept. Corp.</i> , 298 U.S. 178 (1936)	15
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	56, 57
<i>Mellon v. Brewer</i> , (D.C. Cir. 1927) 18 F.2d 168	29

	Page
<i>Mine Safety Appliances Co. v. Forrestal</i> , 326 U.S. 371 (1945)	42
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	51
<i>Missouri v. Fiske</i> , 290 U.S. 18 (1933)	42
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	39
<i>Moyer v. Peabody</i> , 212 U.S. 78 (1909)	23, 24, 35, 37
<i>Murray v. Williams Distilling Co.</i> , 213 U.S. 151 (1909)	42
<i>Nev.-Cal. Electrical Securities Co. v. Imperial Irr.</i> <i>District</i> , (9th Cir. 1936) 85 F.2d 886, cert. denied, 300 U.S. 662 (1937)	21
<i>Newport News S. & Dry Dock Co. v. Schauffler</i> , 303 U.S. 54 (1938)	19
<i>North Carolina v. Temple</i> , 134 U.S. 22 (1890)	42
<i>Norton v. McShane</i> , (5th Cir. 1964) 332 F.2d 855, cert. denied, 380 U.S. 981 (1965)	28, 32
<i>Orloff v. Willoughby</i> , 345 U.S. 83 (1953)	72
<i>Osborn v. United States Bank</i> , 22 U.S. (9 Wheat.) 22 (1824)	40, 60
<i>Ove Gustavsson Contracting Co. v. Floete</i> , (2nd Cir. 1962) 299 F.2d 655, cert. denied, 374 U.S. 287 (1963)	29
<i>Palmer v. The State of Ohio</i> , 248 U.S. 32 (1918)	60
<i>Parden v. Terminal R. Co.</i> , 377 U.S. 184 (1964)	39, 57, 58
<i>Pennoyer v. McConnaughy</i> , 140 U.S. 1 (1891)	53
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	28, 33
<i>Porter v. Sunshine Packing Corporation</i> , (W.D. Pa. 1948) 81 F.Supp. 566	21
<i>Prout v. Starr</i> , 188 U.S. 537 (1903)	53
<i>Ramsey v. Riley</i> , 13 Ohio Rep. 157 (1844)	25, 27, 38
<i>Re Ayers</i> , 123 U.S. 443 (1887)	40, 42, 47
<i>Re New York</i> , 256 U.S. 490 (1921)	38, 39, 40, 42, 51
<i>Reckman v. Keiter</i> , 109 Ohio App. 81, 164 N.E.2d 448 (1959)	25, 28, 38
<i>Rescue Army v. Municipal Court</i> , 331 U.S. 549 (1947)	61
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	67
<i>Roberts v. Williams</i> , (5th Cir. 1971) 456 F.2d 819, cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834	26
<i>Robertson v. Sichel</i> , 127 U.S. 507 (1887)	35

	<i>Page</i>
<i>Ryan v. Coggin</i> , (10th Cir. 1957) 245 F.2d 54	19
<i>S & S Logging Co. v. Barker</i> , (9th Cir. 1966) 366 F.2d 617	33
<i>Sanial v. Bossoreale</i> , (S.D. N.Y. 1967) 279 F.Supp. 940	15, 16
<i>Scherer v. Brennan</i> , (7th Cir. 1967) 379 F.2d 609, cert. denied, 389 U.S. 1021 (1967)	28
<i>Shaugnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	75
<i>Silver v. Dickson</i> , (9th Cir. 1968) 403 F.2d 642	28
<i>Sires v. Cole</i> , (9th Cir. 1963) 320 F.2d 877	40
<i>Sittenfeld v. Tobriner</i> , (D.C. Cir. 1972) 459 F.2d 1137	28
<i>Smith v. Reeves</i> , 178 U.S. 436 (1899)	39
<i>Smith v. Sperling</i> , 354 U.S. 91 (1957)	16
<i>Spalding v. Vilas</i> , 161 U.S. 483 (1896)	28, 31, 35
<i>State, ex rel. Williams v. Glander</i> , 148 Ohio St. 188, 74 N.E.2d 82 (1947)	63, 64
<i>State of Hawaii v. Gordon</i> , 373 U.S. 57 (1963)	40
<i>Sterling v. Constantine</i> , 287 U.S. 378 (1932)	24, 51, 54, 55
<i>Stewart v. Southard</i> , 17 Ohio Rep. 402 (1848)	25, 27, 38
<i>Sulger v. Pochyla</i> , (9th Cir. 1968) 397 F.2d 173, cert. denied, 393 U.S. 981 (1968)	28
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951)	28, 33
<i>Thomas v. Wilton</i> , 40 Ohio St. 516 (1884)	25, 28
<i>Tindal v. Wesley</i> , 167 U.S. 204 (1897)	38
<i>United States v. Cigarette Merchandisers' Association</i> , (S.D. N.Y. 1955) 18 F.R.D. 497	16
<i>United States v. Lee</i> , 106 U.S. 196 (1882)	47
<i>United States on the Relation of Hall v. Payne</i> , 254 U.S. 343 (1920)	45
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	54
<i>Wetmore v. Rymer</i> , 169 U.S. 115 (1898)	15
<i>Wierzbicki v. Carmichael</i> , 118 Ohio App. 239, 187 N.E.2d 184 (1963)	25, 28, 38
<i>Wilkes v. Dinsman</i> , 48 U.S. (7 How.) 618 (1849)	28, 30, 31
<i>Yearsley v. W. A. Ross Construction Co.</i> , 309 U.S. 18 (1939)	40

	<i>Page</i>
CONSTITUTIONS, STATUTES, AND RULES	
United States Constitution:	
Article I, Section 8, Clause 16.....	68
Article I, Section 8, Clause 18.....	56
Amendment XI.....	<i>passim</i>
Amendment XIV.....	55, 56
Amendment XIV, Section 5.....	56, 57, 58
United States Code:	
Title 10	
Section 331.....	55
Title 28	
Section 1331.....	38, 39
Section 1332.....	61
Section 1343.....	38, 39
Section 1652.....	62
Title 32	
Section 501.....	71
Section 701.....	71
Title 42	
Section 1983.....	<i>passim</i>
Federal Rules of Civil Procedure:	
Rule 12b(1).....	<i>passim</i>
Rule 12b(6).....	<i>passim</i>
Rule 12d.....	16, 17
Rule 12h(3).....	15
Rule 19(a).....	74, 75
Rule 19(b).....	75, 76
Rule 56(a).....	17, 18
Ohio Constitution:	
Article I, Section 16.....	11, 37, 62, 65
Article III, Section 10.....	41
Article IX, Section 3.....	41
Article IX, Section 4.....	41
Ohio Revised Code:	
Section 2125.01.....	11

	<i>Page</i>
Section 3341.01	41
Section 3341.02(B)	41
Section 3341.04	41
Section 5919.02	41
Section 5919.05	41
Section 5923.21	41
Section 5923.22	41
Section 5923.231	41
Section 5923.37	11, 13, 36, 37, 60, 64
Section 5923.99(A)	41

TEXTS AND ARTICLES

32 Am. Jr. 2d, <i>Federal Practice and Procedure</i> , Sections 170-172 (1967)	63
Barron & Holzoff, 1A <i>Federal Practice and Procedure</i> , Section 350 (Wright ed. 1960)	21
Comment, <i>Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and The Doctrine of Official Immunity</i> , 44 Calif.L.Rev. 887 (1956)	26
8 Cyc. Fed. Proc., Sections 26.226, 26.247 (3rd ed. 1968)	21
II Harper and James, <i>Law of Torts</i> , Section 29.8 (1956)	37
Jaffe, <i>Suits Against Governments and Officers: Sovereign Immunity</i> , 77 Harv.L.Rev. 1 (1963)	39
2 A Moore's <i>Federal Practice</i> Section 8.07	15
Section 12.08	19
Wiener, <i>The Militia Clause of the Constitution</i> , 54 Harv. L.Rev. 181 (1940)	68, 74
5 C. Wright and A. Miller, <i>Federal Practice and Procedure</i> , Civil Section 1350 (1967)	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of
Sandra Lee Scheuer, Deceased,

-v.-

Petitioner,

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, Various Officers and Enlisted Men,
and ROBERT WHITE,

AND

Respondents.

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased,

-v.-

Petitioner,

GOVERNOR JAMES RHODES, SYLVESTER DEL
CORSO and ROBERT CANTERBURY,

and

Respondents,

ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased,

-v.-

Petitioner,

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT
CANTERBURY, HARRY D. JONES, JOHN E. MARTIN,
RAYMOND J. SRP, ALEXANDER STEVENSON AND
VARIOUS OFFICERS AND ENLISTED MEN AND
ROBERT WHITE,

Respondents.

**BRIEF¹ OF RESPONDENTS DEL CORSO, CANTERBURY,
JONES, MARTIN, SRP AND WHITE**

¹On July 11, 1973, during a telephone conversation between this Court's Mr. Rodak and Mr. Howarth, one of the attorneys representing respondents herein, Mr. Rodak granted respondents' request that they be permitted to file a single brief in the two cases above captioned. The substance of this telephone conversation was confirmed by letter from Mr. Howarth to Mr. Rodak of the same day.

QUESTIONS PRESENTED

1. Under respondents' first argument (ARGUMENT, pp. 14-21 *infra*), "The Lower Court Properly Considered the Complaints' Allegations," the Scheuer brief's third question (Sch. Br. 4)² and the first question presented by the Krause-Miller brief (K.-M. Br. 7) are examined. Respondents are not satisfied with petitioners' simplistic definition of the question in that the relevant issues are obscured. Consequently, the following two questions are considered by respondents:

A. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed. R. Civ. P., motion to dismiss?

B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed. R. Civ. P., motion to dismiss?

2. Under respondents' second argument (ARGUMENT, pp. 22-38 *infra*), "The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted," respondents consider the second question presented by the Scheuer brief (Sch. Br. 4) and the third question of the Krause-Miller brief (K.-M. Br. 7). Respondents wish to more accurately present the issues included therein:

A. Respondent, Governor James A. Rhodes.

²For purposes of respondents' brief, "Sch. Pet.", together with Arabic numerals, refers to pages of the Scheuer Petition for Writ of Certiorari containing a copy of Mrs. Scheuer's complaint and the Opinion of the United States Court of Appeals for the Sixth Circuit. "Sch. Br.", together with Arabic numerals, refers to pages of the Brief of Petitioner, Mrs. Scheuer. "K.-M. Br." and "K.-M. App." together with Arabic numerals, refers to pages of Mr. Krause and Mrs. Miller's Appendix and Brief of Petitioners, respectively. "K.-M. Pet.", together with Arabic numerals, refers to pages of the Krause-Miller Petition for Writ of Certiorari containing the Opinion of the district court.

1. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?
2. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a wrongful death cause of action brought under diversity jurisdiction?

B. The Remaining Respondents.

1. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?
2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a wrongful death action brought under diversity jurisdiction?

3. Under respondents' third argument (ARGUMENT, pp. 38-66 *infra*), "The Lower Court Lacked Subject Matter Jurisdiction," the Scheuer brief's first question (Sch. Br. 3-4) and the second question presented by the Krause-Miller brief (K.-M. Br. 7) are considered. The Krause-Miller brief's fourth question, relating to the federal court's diversity of citizenship jurisdiction (K.-M. Br. 7), is also examined within respondents' third argument. Respondents are satisfied with petitioners' presentation of these questions.

4. Respondents' fourth argument (ARGUMENT, pp. 66-74 *infra*), "The Allegations of Petitioners' Complaints

Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Justiciable Political Questions," considers the Scheuer brief's fourth question presented (Sch. Br. 4) relating to the applicability of the *Gilligan v. Morgan*, U.S. , 37 L.Ed.2d 407 (1973), precedent to the realities now before this Court. The all-inclusive language of petitioner's question is inappropriate in that the lower court's holding of non-justiciability related only to a limited class of petitioners' allegations.

5. Respondents' fifth argument (ARGUMENT, pp 74-76 *infra*), "The Federal Government Is an Indispensable Party to the Ajudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard," examines the Krause-Miller brief's fifth question (K.-M. Br. 8). Again, petitioners' sweeping language is improper since the lower court's indispensable party ruling focused on a limited number of petitioners' allegations.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

Amendment XIV:

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 28

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:

Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION

Article I, Section 16:

* * *

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Article III, Section 10:

He (Executive) shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the United States.

Article IX, Section 3:

The Governor shall appoint the Adjutant General, Quartermaster General, and such other staff officers, as may be provided for by law. Majors General, Brigadiers General, Colonels, or Commandants of Regiments, Battalions, or Squadrons, shall, severally, appoint their staff, and Captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The Governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the Militia, to execute the laws of the State, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 3341.01:

The Bowling Green state normal school, and the Kent state normal school, established under 101 O. L. 320, shall be known as the 'Bowling Green State University' and the 'Kent State University,' respectively.

Section 3341.02 (B):

The government of Kent state university is vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate. . . .

Section 3341.04:

The boards of trustees of Bowling Green state university and Kent state university, respectively, shall elect, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary by said boards. The boards shall do all things necessary for the proper maintenance and successful and continuous operation of such universities.

Section 5919.02:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, or arm of the service in which they are appointed. . . .

Section 5919.05:

Commissioned officers of the Ohio national guard shall take and subscribe to the following oath of office: 'I, _____, do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the Governor of the state of Ohio; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of _____ in the National Guard of the United States and of the state of Ohio, upon which I am about to enter, so help me God.'

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do

or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra*.]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends; may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.37:

When a member of the organized Militia is ordered to duty by State authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF THE CASE

Respondents are satisfied with petitioners' resumes of the case (Sch. Br. 5-11, K.-M. Br. 8-10), excepting the argument (See, e.g., Sch. Br. 8-9) contained therein and subject to the following correction of error.

First, the court of appeals did not hold that, "... the defendants enjoyed the defense of *absolute* personal immunity ..." (K.-M. Br. 10; emphasis added). Rather, the lower court held that Respondent Rhodes had *absolute* immunity (Sch. Pet. 12a) but that the remaining respondents possessed only a *qualified* personal immunity (Sch. Pet. 20a). Further, petitioners are incorrect when asserting that the lower courts "... [failed to give] any consideration to the diversity claims of these petitioners ..." (K.-M. Br. 10). Both the district court (K.-M. Pet. 37-44) and the court of appeals (Sch. Pet. 14a-15a) considered the Eleventh Amendment and Article I, Section 16, of the Ohio Constitution, prohibiting the federal courts from exercising diversity jurisdiction over petitioners' wrongful death actions.³

Additionally, respondents wish to emphasize and bring to this Court's attention certain uncontradicted facts before the trial court.

1. There were but seven defendants within the personal jurisdiction of the trial court, and upon whom the judg-

³The Ohio wrongful death statute is found at §2125.01, Ohio Revised Code, and not §5923.37, Ohio Revised Code, as stated in the Krause-Miller brief (K.-M. Br. 9).

ment of the lower court is premised; to-wit, Governor Rhodes, Adjutant General Del Corso, Assistant Adjutant General Canterbury, Major Jones, Captains Martin and Srp, and President White (Sch. Pet. 20a).

2. Presented to the trial court as evidentiary exhibits appended to respondents' motions to dismiss were relevant Executive Proclamations evincing that, at the time petitioners' alleged causes of action arose, the Ohio National Guard, including the respondents herein, had been called to active duty pursuant to the statutory law of Ohio (Sch. Pet. 3a, 23a-26a).

3. Further, the substance of the relevant Executive Proclamations, cited above, factually demonstrated to the lower courts that a condition of insurrection and rampage existed at the Kent State University, and that, in response thereto, the Ohio National Guard, including the respondents, were ordered and authorized by Governor Rhodes to take that action necessary to protect life and property on and to restore order to the Kent State University (Sch. Pet. 3a, 23a-26a).

4. Petitioners' complaints acknowledge that, at the time petitioners' causes of action arose, the respondents were all agents of the State of Ohio; that respondents were ordered to active duty by the Governor of Ohio; and that none of the respondents herein fired the shots, killing petitioners' decedents (Sch. Pet. 83a-91a; K.-M. Pet. 47-57).

5. Attached to respondents' motion to dismiss in the Krause case were affidavits of Respondents Del Corso and Canterbury stating:

"4. At the time plaintiff's alleged causes of action arose, I [Respondent Del Corso] was in Columbus, Ohio, and not on the Kent State Campus. (K.-M. App. 27)"

"4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I [Respondent Canterbury] made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause. (K.-M. App. 28)."

SUMMARY OF ARGUMENT

The ARGUMENT, hereinafter set forth, initially demonstrates (A.) that the lower courts properly inquired into the realities presented by petitioners' complaints when considering respondents' Rule 12b(1), Fed. R. Civ. P., motions to dismiss. Thereafter, it is shown that (B.) the lower courts paid all due allegiance to the allegations of petitioners' complaints when ruling upon respondents' Rule 12b(6), Fed. R. Civ. P., motions to dismiss (ARGUMENT, pp. 14-21 *infra*).

Respondents' second argument is considered relative to (A.) Governor Rhodes and (B.) the remaining respondents. This argument demonstrates that the lower courts properly applied the doctrine of executive immunity when concluding that petitioners' (1.) Section 1983 and (2.) diversity causes of action failed to state claims upon which relief could be granted (ARGUMENT, pp. 22-38 *infra*). Thirdly, and independent of this Court's disposition of the executive immunity issue, respondents demonstrate that the lower courts lacked subject matter jurisdiction over petitioners' (A.) Section 1983 and (B.) diversity causes of action pursuant to the Eleventh Amendment and substantive law of Ohio. Section 5923.37, Ohio Revised Code, is (C.) shown to be unrelated to the governmental immunity of the State of Ohio. Although nominally brought against Ohio's public officials, the essential nature and effect of petitioners' actions seriously interfere with Ohio's highest

governmental duty to her citizenry (ARGUMENT, pp. 38-66 *infra*).

Further, and again independent of the above, respondents demonstrate that petitioners' allegations, challenging the propriety of the Ohio National Guard's training and weaponry, raise non-justiciable, political issues (ARGUMENT, pp. 66-74 *infra*). Finally, relative to these issues involving the propriety of the Ohio National Guard's training and weaponry, the Federal Government is shown to be an indispensable party (ARGUMENT, pp. 74-76 *infra*).

ARGUMENT

I. *The Lower Court Properly Considered the Complaints' Allegations.*

The substance of petitioners' first arguments (Sch. Br. 13, K.-M. Br. 17) is properly separated and viewed in relation to: (A.) Rule 12b(1), Fed. R. Civ. P., motions to dismiss, and (B.) Rule 12b(6), Fed. R. Civ. P., motions to dismiss. The propriety of this approach to the question is apparent from the lower appellate court's affirmance of the complaints' dismissals upon two separate and independent bases; to-wit, the federal courts' lack of subject matter jurisdiction (Eleventh Amendment), and the complaints' failure to state a claim upon which relief could be granted (Executive immunity) (Sch. Pet. 20a).⁴

⁴This Court has previously drawn the same lines of approach. In *Land v. Dollar*, 330 U.S. 731 (1946), after discussing motions to dismiss complaints for their failure to state viable causes of action, Justice Douglas continued:

"... But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion [Procedural citations omitted], the court may inquire, by affidavits or otherwise, into the facts as they exist. [Case citations omitted] As stated in *Gibbs v. Buck*, *supra*, (307 U.S. pp. 71, 72 83 L.ed. 1115, 59 S. Ct. 725), "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Land v. Dollar*, *supra*, 330 U.S., 735 n., 4.

A. Is a United States District Court required to take a complainant's allegations as true when deciding a Rule 12b(1), Fed. R. Civ. P., motion to dismiss?

It is well-established that courts of limited jurisdiction, including the federal courts of this country, may weigh the merits of a motion placing in issue the court's subject matter jurisdiction. Rule 12h(3), Fed. R. Civ. P., endorses this basic precept:

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

This Court, interpreting the predecessor of Rule 12h(3), stated the controlling rule in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 184 (1936):

"The trial court is not bound by the pleadings of the parties, but may, on its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist'."

See also: *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277-78 (1936); *Wetmore v. Rymer*, 169 U.S. 115, 120-21 (1898); 2A *Moore's Federal Practice*, Section 8.07, p. 1634 (1962); 5 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil Section 1350 (1969).

It must be noted that the Krause-Miller brief's first argument makes absolutely no mention of Rule 12b(1), motions to dismiss. Although the Scheuer brief does make passing reference to Rule 12b(1) motions (Sch. Br. 13-14), the conclusions drawn therein are unfounded.

The Scheuer brief cites *Sanial v. Bossoreale*, (S.D. N.Y. 1967) 279 F. Supp. 940, for the proposition that, "If such a motion [Rule 12b(1)] involves disputed factual issues, the court must hold a preliminary, evidentiary hearing to resolve the issue of jurisdiction . . . (Sch. Br. 14, emphasis

added)." In the *Sanial* case, *defendants moved* for a preliminary hearing of their motion to dismiss pursuant to the provisions of Rule 12(d), Fed. R. Civ. P. There is no obligatory language in the decision compelling a federal trial court to proceed to a preliminary hearing on the jurisdictional issues raised by a Rule 12b(1), motion to dismiss.

Citing *Smith v. Sperling*, 354 U.S. 91 (1957) and *United States v. Cigarette Merchandisers' Association*, (S.D. N.Y. 1955) 18 F.R.D. 497, the Scheuer brief argues that the Rule 12b(1) motion to dismiss must be deferred until the trial on the merits if the resolution of the jurisdictional issue is tantamount to resolution of the merits (Sch. Br. 15). In *United States v. Cigarette Merchandisers' Association*, *supra*, as in *Sanial v. Bossoreale*, *supra*, defendants filed a Rule 12(d) motion. The court, *exercising its discretionary power relative to preliminary hearings involving jurisdictional issues*, denied defendants' motion since the preliminary hearing would have disclosed the government's parallel criminal case before the criminal trial.

Smith v. Sperling, *supra*, concerned, in part, the issue of diversity jurisdiction tested by the trial court via a preliminary hearing. This court negatively criticized the trial court for its poor discretion and wasteful exertion of energy on the preliminary jurisdictional issue in the case, concluding:

"It seems to us that the proper course is *not* to try out the issue presented by the charges of wrong doing but to determine the issue of antagonism [controlling the jurisdictional issue of diversity in the case] *on the face of the pleadings and by the nature of the controversy.*" (345 U.S., 96; *emphasis added*)

Respondents agree with the lessons taught by these cases; specifically, the convening of preliminary hearings to

determine the propriety of subject matter jurisdictional attacks is within the sound discretion of the trial court, and that, in the first instance, issues of subject matter jurisdiction are to be determined from the face of the pleadings and by the nature of the controversy.

Parenthetically, and as a harbinger of respondents' later argument, respondents did not move for a preliminary hearing in the trial court on the jurisdictional issues since this procedure would have mooted their Eleventh Amendment argument. [Petitioners' rationale for not requesting a Rule 12(d) preliminary hearing is not known—certainly the option was available to them.] It is judicially recognized that petitioners' actions would interfere with Ohio's governmental functions as a result of Ohio's public officials being exposed to the harassment and inevitable hazards inherent in public trial, whether the trial be a preliminary hearing of the jurisdictional issues or the ultimate trial of fact. If a jurisdictional hearing had been conducted, the harm to Ohio would be realized; respondents' Eleventh Amendment position becoming dormant.

Thus, the lower courts were empowered and properly "inquire [d] into the facts as they really exist," exercising sound judicial discretion. The appropriateness of the lower courts' conclusion is hereinafter considered (ARGUMENT, pp. 38-66 *infra*).

B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed. R. Civ. P., motion to dismiss?

The answer to the above posed question is contingent upon the realities before the court in each case. It is well established that a pleader cannot rely solely upon his complaint's allegations in the face of contrary evidence presented pursuant to Rule 56, Fed. R. Civ. P. It is also established that allegations amounting to conclusions of

law and/or unwarranted deductions of fact need not be accepted as true. Finally, federal trial courts are not bound to accept as true allegations at odds with facts judicially known to them.

Rule 12b, Fed. R. Civ. P., provides that when presented a Rule 12b(6), motion to dismiss, trial courts are to treat evidence introduced therewith in accordance with the procedures of the summary judgment provision. Rule 56(e) states, in no uncertain terms:

" . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the cases at bar, there is no question but that relevant Executive Proclamations were appended to respondents' motions to dismiss.

Initially, it is important to note that the Proclamations' substance is not contrary to the allegations of petitioners. These public documents established, *inter alia*, (1) that a condition of insurrection, rampage, and public danger existed at Kent State University, May 4, 1970; (2) that in response thereto, the Ohio National Guard, including respondents, were ordered by Governor Rhodes to take that action necessary to protect life and property on the campus and restore order thereto; and (3) that the call-up of the Ohio National Guard was accomplished pursuant to the law of Ohio. (Sch. Pet. 3a; 23a-26a).

Assuming petitioners argue that the Proclamations are in some manner offensive to their allegations, petitioners

lodged no contrary evidence in the trial court, electing instead to stand upon the allegations of their complaints. Consequently, the factual realities embodied in the Executive Proclamations were properly accepted as true by the trial court notwithstanding the allegations of the various complaints.

Secondly, the federal courts have uniformly held that Rule 12b(6), motions to dismiss admit all well-pleaded factual allegations; however, conclusions of law and/or unwarranted deductions of fact are not admitted. See, e.g., *Newport News S. & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938); *Ryan v. Coggin*, (C.A. 10th 1957) 245 F.2d 54, 57; *Hiland Dairy, Inc. v. Kroger Co.*, (C.A. 8th 1968) 402 F.2d 968, 973, cert. denied 395 U.S. 961 (1968); *International Bk. of M. v. Banco de Economics y Prestamos*, 55 F.R.D. 180, 186 (1972); 2A *Moore's Federal Practice*, §12.08, pp. 2266-69 (1972). Petitioners' complaints are saturated with both conclusions of law and unwarranted deductions of fact.

In order not to belabor the point, the First Cause of Action contained in the Krause Amended Complaint is considered as a fair example of the pleadings presented to the trial court by the petitioners (K.-M. Pet. 47-50):

"At all times herein mentioned all *defendants acted and conspired* under color of statutes, ordinances, regulations, customs and usages of the State of Ohio." (Emphasis added)

"Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

"Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place;

"Defendants knew said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and

"Defendants knew that the presence of such troops, so improperly trained, and so armed under the circumstances created an unreasonable danger on the campus at Kent State University, creating an eminent risk of injury and death to all students then on the campus, including plaintiff's decedent, Allison Krause." (Emphasis added)

"Suddenly and without warning and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, intentionally, wilfully, wantonly and maliciously disregarding the lives and safety of students, spectators, passers-by * * * including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, . . ." (Emphasis added)

"All acts herein mentioned were done individually and in conspiracy by these defendants and by other unknown persons with the specific intent of depriving plaintiff and plaintiff's decedent of their rights to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio." (Emphasis added)

Pleadings such as these, replete with conclusions of law and unwarranted deductions of fact, compelled Judge O'Sullivan to file his *concurring opinion* in the court of appeals. (Sch. Pet. 27a-31a). As hereinafter demonstrated, pleadings such as these would directly affect the efficiency of Ohio's governmental functions if these suits were de-

terminated to be within the federal courts' jurisdiction (ARGUMENT, pp. 38-66 *infra*).

Finally, the federal courts need not accept as true a complaint's allegations in conflict with facts judicially known to the court. *Nev.-Cal. Electrical Securities Co. v. Imperial Irr. District*, (C.A. 9th 1936), 85 F.2d 886, 904, *cert. denied*, 300 U.S. 662 (1937); *Interstate Nat. Gas Co. v. Southern California Gas Co.*, (C.A. 9th 1953) 209 F.2d 380, 384; *Blackburn v. Fisk University*, (C.A. 6th 1971) 443 F.2d 121, 123; Barron & Holzoff, 1A *Federal Practice and Procedure*, §350, p. 330 (Wright ed. 1960). A succinct definition of the evidentiary rule of judicial notice is found in the case of *Porter v. Sunshine Packing Corporation*, (W.D. Pa. 1948) 81 F. Supp. 566:

"Judicial knowledge may be defined as the cognizance of certain facts which a judge under the rules of legal procedure or otherwise may properly take or act upon without proof because they are already known to him or because of that knowledge which a judge has, or is assumed to have, or merely another way of expression that the usual forms of evidence will be dispensed with if the fact is one of such public concern or notoriety which is known generally by all well-informed persons. As has been said, judges will not shut their minds to truths that all others can see and understand." (81 F. Supp., 575; omitting reference citations.)

The existence of inexcusable destruction and civil rampage present in Kent, Ohio, May 4, 1970, are matters of public notoriety and historical documentation. As such, these conditions are within the ambit of judicial notice. See, *e.g.*, 8 *Cyc. Fed. Proc.* §§26.226, 26.247 (3rd ed. 1968).

The propriety of the lower courts' judgment dismissing petitioners' complaints pursuant to Rule 12b(6), Fed. R. Civ. P., is next considered.

II. The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted.

The question as presented by both the Scheuer brief (Sch. Br. 4) and the Krause-Miller brief (K.-M. Br. 7) is premised upon a conclusion never drawn by the lower court. The court of appeals did not hold that all respondents possessed absolute executive immunity to suit. Rather, the majority concluded that, under the facts at bar, Governor Rhodes had *absolute* immunity (Sch. Pet. 12a) and that the remaining respondents were protected by a *qualified* immunity to petitioners' Section 1983 causes of action (Sch. Pet. 20a). Thus, the immunity of the various respondents must be considered in the light of this distinction.

Before considering the specific issues presented, respondents respectfully call this Court's attention to the contradicted factual realities before the lower courts (STATEMENT OF THE CASE, paras. 1-5, pp. 11-13 *supra*).

A. Respondent, Governor James Rhodes

1. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

It is firmly entrenched in judicial precedent that the executive's decision to call out the militia is a matter within his sole discretion and not subject to judicial review. As early as 1827, this Court stated:

"The power thus confided by Congress to the President is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. . . . If it be a limited power, the question arises, by whom is the exi-

gency to be judged of and decided? . . . We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." *Martin v. Mott*, 25 U.S. (12 Wheat.) 537,540 (1827)

Again, in 1849, this Court, speaking through Chief Justice Taney, held:

"After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful." *Luther v. Borden*, 48 U.S. (7 How.) 581,599 (1849).

This Court has consistently followed the precedent established in *Mott* and *Luther* when dealing with the actions of a Governor⁵ in calling out the militia. *Moyer v.*

⁵The power of the Governor of the State of Ohio to call out the militia is likewise constitutionally provided under Article IX, Section 4, Ohio Constitution. See: *infra* note 15.

Peabody, 212 U.S. 78 (1909); *Sterling v. Constantine*, 287 U.S. 378 (1932).

Moyer was an action for false imprisonment brought against the former governor of Colorado, the former adjutant general of the Colorado national guard, and a captain of a company of the national guard. The following statement of Justice Holmes is crucial to the issue of immunity:

"As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case." 212 U.S. 78, 85-86 (1909)

Petitioners cite *Sterling v. Constantine*, *supra*, as being, "... the best possible expression of their position on the subject of executive immunity" (K.-M. Br. 67). It is sufficient to say that *Sterling* has little, if any, relevance to this issue. This Court, in *Sterling*, approved *Mott*, *Luther* and *Moyer*, but distinguished them on the ground that Governor Sterling's decision to have the military enforce limits on state oil production came *after* a federal district court had granted a temporary restraining order enjoining the state's oil quota.

The kind of *ex post facto* review prohibited by *Mott*, *Luther*, and *Moyer* was not at issue in *Sterling* for the federal district court had exercised jurisdiction in matters involving the "exigency" prior to Governor Sterling's assertion of his military powers. Lower federal courts, when faced directly with Section 1983 causes of action against a Governor, have reached the same conclusion as the lower court herein; the Governor had absolute im-

munity. See: *Martone v. McKeithen*, (5th Cir. 1969) 413 F.2d 1373.

2. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a wrongful death action brought under diversity jurisdiction?

The law of Ohio is well settled that, "... a public officer cannot be held accountable for any act done while performing a function which requires the exercise of discretion." *Reckman v. Keiter*, 109 Ohio App. 81, 164 N.E. 2d 448 at 458 (1959). See also: *Ramsey v. Riley*, 13 Ohio Rep. 157 (1844); *Stewart v. Southard*, 17 Ohio Rep. 402 (1848); *Gregory v. Small*, 39 Ohio St. 346 (1883); *Thomas v. Wilton*, 40 Ohio St. 516 (1884); *Wierzbiicki v. Carmichael*, 118 Ohio App. 239, 187 N.E.2d 184 (1963). Respondent Rhodes was the highest public officer in the State of Ohio; consequently, the lower court was correct in holding him immune to petitioners' wrongful death actions brought under diversity jurisdiction.

B. The Remaining Respondents.

1. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

Petitioners contend that the lower court's executive immunity determination, "... has been rejected by the *great majority* of lower courts which have considered the issue" (Sch. Br. 28, *emphasis added*) and is a "new executive immunity" (K.-M. Br. 79) which should be rejected

by this Court. In support of this contention, petitioners cite: *Carter v. Carlson*, (D.C. Cir. 1971) 447 F.2d 358, *rev'd on other grounds*, 409 U.S. 418 (1973); *Jobson v. Heine*, (2nd Cir. 1966) 355 F.2d 129; *Birnbaum v. Trussell*, (2nd Cir. 1965) 347 F.2d 86; *Roberts v. Williams*, (5th Cir. 1971) 456 F.2d 819, *cert. denied*, 404 U.S. 866 (1971), addendum 456 F.2d 834; *Jones v. Perrigan*, (6th Cir. 1972) 459 F.2d 81; *McLaughlin v. Tilendis*, (7th Cir. 1968) 398 F.2d 287. *Carter*, *Jobson*, *Roberts*, *Jones*, and *McLaughlin* all recognize the existence of executive immunity as a defense to a Section 1983 action but would apply the immunity sparingly. Moreover, it must be noted that all of these cases can be cited in support of the lower court's executive immunity determination as they endorse a case by case analysis.

Petitioners cite a passage from *Birnbaum v. Trussell*, *supra*, (a Section 1983 action by a doctor against commissioners of city department of hospitals and union president for dismissal on grounds of racial prejudice) as being the universally accepted rationale for the rejection of executive immunity against a Section 1983 action. (Sch. Br. 28) *Birnbaum* is readily distinguishable from the cases at bar. *Birnbaum* was brought on the grounds of racial discrimination necessarily involving divergent policy considerations. See, Comment: *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 Calif. L. Rev. 887 (1956); also, the concurring opinion of Senior Circuit Judge O'Sullivan (Sch. Pet. 27a).

This distinction can be further explained by the following passage from Justice Brennan's unanimous opinion in *District of Columbia v. Carter*, U.S. , 34 L.Ed.2d 613 (1973):

"Thus, in the final analysis, [Section] 1 of the 1871 Act may be viewed as an effort 'to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.' " (citation omitted) 34 L.Ed.2d, 623.

Thus, *Birnbaum* can be viewed as a classic Section 1983 case for, "by reason of [racial] prejudice", the plaintiff was denied his right to work by a state agency. Similarly, petitioners cite *Ex parte Virginia*, 100 U.S. 339 (1880), apparently to show an instance in which this Court refused to extend judicial immunity to a magistrate (K.-M. Br. 72). Although *Ex parte Virginia* is readily distinguishable on the grounds that the act (refusing to allow negroes on juries) was ministerial, rather than discretionary, it is a clear example of an individual representing a State in some capacity who, "by reason of [racial] prejudice", refused to accord a citizen his Fourteenth Amendment rights.

The causes of action in *Ex parte Virginia* and *Birnbaum* would not have existed without the passage of the Civil Rights Act of 1871, and there is sound policy foundation for not allowing immunity to defeat claims of racial discrimination. Claims such as those presently before this Court, alleging no racial discrimination, are governed by different policy considerations. Petitioners, by bringing Section 1983 actions in combination with wrongful death actions, are attempting to have this Court enter the fray and negate the decisions of the Ohio courts which would hold respondents immune to petitioners' wrongful death actions. *Ramsey v. Riley*, *supra*; *Stewart v. Southard*, *su-*

pra; *Gregory v. Small*, *supra*; *Thomas v. Wilton*, *supra*; *Reckman v. Keiter*, *supra*; *Wierzbicki v. Carmichael*, *supra*.

Petitioners, when stating that the great majority of lower courts refuse to allow immunity against a Section 1983 action (Sch. Br. 28), and that the lower court, in their decision herein, created a new executive immunity (K.-M. Br. 79), are ignoring a consistent line of lower court decisions holding state governmental officials immune to Section 1983 causes of action for discretionary acts done within the scope of their authority. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, (2nd Cir. 1972) 456 F.2d 1339; *Anderson v. Nosser*, (5th Cir. 1971) 438 F.2d 183; *Martone v. McKeithen*, (5th Cir. 1969) 413 F.2d 1373; *Bradford Audio Corporation v. Pious*, (2nd Cir. 1968) 392 F.2d 67; *Silver v. Dickson*, (9th Cir. 1968) 403 F.2d 642; *Lumbermens Mutual Casualty Company v. Rhodes*, (10th Cir. 1968) 403 F.2d 2, cert. denied, 394 U.S. 965 (1969); *Franklin v. Meredith*, (10th Cir. 1967) 386 F.2d 958; *Norton v. McShane*, (5th Cir. 1964) 332 F.2d 855, cert. denied, 380 U.S. 981 (1965); *Hoffman v. Halden*, (9th Cir. 1959) 268 F.2d 280. The policy considerations calling for immunity to be given officials for their discretionary acts are defined in the previous decisions of this Court and lower federal appellate courts. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); *Dalehite v. United States*, 346 U.S. 15 (1953); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 618 (1849); *Kendall v. Stokes*, 44 U.S. (3 How.) 506 (1845); *Sittenfeld v. Tobriner*, (D.C. Cir. 1972) 459 F.2d 1137; *David v. Cohen*, (D.C. Cir. 1969) 407 F.2d 1268; *Sulger v. Pochyla*, (9th Cir. 1968) 397 F.2d 173, cert. denied, 393 U.S. 981 (1968); *Scherer v. Brennan*, (7th Cir. 1967) 379 F.2d 609, cert. denied, 389 U.S. 1021

(1967); *Blitz v. Boog*, (2nd Cir. 1964) 328 F.2d 596, cert. denied, 379 U.S. 855 (1965); *Brownfield v. Landon*, (D.C. Cir. 1962) 307 F.2d 389, cert. denied, 371 U.S. 924 (1962); *Ove Gustavsson Contracting Co. v. Floete*, (2nd Cir. 1962) 299 F.2d 655, cert. denied, 374 U.S. 287 (1963); *Gregoire v. Biddle*, (2nd Cir. 1949) 177 F.2d 579, cert. denied, 339 U.S. 949 (1950); *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F.2d 40, cert. denied, 314 U.S. 665 (1941); *Cooper v. O'Conner*, (D.C. Cir. 1938) 99 F.2d 135, cert. denied, 305 U.S. 643 (1938); *Mellon v. Brewer*, (D.C. Cir. 1927) 18 F.2d 168. These cases endorse the basic policy determination that governmental officials must not be hampered by the fear of ill-founded, vindictive law suits.

Though the above citations by no means purport to be a complete list of cases recognizing tort immunity for the discretionary acts of governmental officials, the lower court's finding that the complaints failed to state a claim upon which relief could be granted (i.e., the respondents were immune to suits under the facts at bar) can hardly be characterized as a "new extension" of immunity in the face of the "great majority" of lower court decisions. Additionally, petitioners argue that the lower court's immunity determination, giving respondents immunity to petitioners' Section 1983 causes of action, was incorrect for: 1) there was no historical basis for executive immunity prior to the passage of the Civil Rights Act of 1871 (42 U.S.C. Section 1983) (Sch. Br. 31); and 2) there was historical precedent for legislative and judicial immunity, and Section 1983 must have been intended to apply only to acts of the executive (K.-M. 75, Sch. Br. 31).

Contrary to petitioners' bold statement that, "Executive immunity had no common law recognition in the United States," (Sch. Br. 31), this Court, speaking through Chief Justice Taney, wrote in *Kendall v. Stokes*, 44 U.S. (3

How.) 506 (1845) (a damage action against Postmaster General for illegally and maliciously refusing to pay a sum of money to which plaintiff was lawfully entitled):

"But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion: even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland, v. Ld. Palmerston*⁶ (J. B. Moore, 91; 3 B. & B., 275)" 44 U.S. (3 How.) 506, 512 (1845) (Footnote added).

Similarly, in *Wilkes v. Dinsman*, 48 U.S. (7 How.) 618 (1849), this Court, in reversing and remanding judgment for a marine in an action for assault and battery and false imprisonment against his commanding officer said:

"It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their

⁶The case of *Gidley, Executor of Holland v. Lord Palmerston*, 3 B. & B. 275 (1822) involved an action by a retired clerk of the war office against the secretary of war to collect a retired allowance to which he was lawfully entitled. On the issue of immunity, the court stated:

"... on principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved: and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed; yet, the very liability to an unlimited multiplicity of suits, would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself." 3 B. & B. 275, 286-87 (1822).

deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.' " 48 U.S. (7 How.) 618, 637 (1849).

Kendall and Wilkes, prove that the doctrine of executive immunity, at least for discretionary acts, was a viable one recognized and approved by this Court prior to the 1871 passage of the Civil Rights Act. In *Spalding v. Vilas*, 161 U.S. 483 (1896), this Court put an end to any speculation regarding the existence of executive immunity in the United States. The Court stated the proposition thusly:

"In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals." 161 U.S. 483, 498-99 (1896) See also: *Barr v. Matteo*, 360 U.S. 564, 570-71 (1959).

The most important lesson to be gained from the review of executive immunity cases is that even though *Kendall* and *Wilkes* were not cited in *Spalding*, the *Spalding* Court, faced with the always present conflict between the protection of the individual citizen against pecuniary damage

caused by an agent of the government and the protection of the public interest by shielding responsible officials from ill-founded damage action brought on account of action taken in the exercise of their official responsibilities, reached the identical conclusion by resolving the conflict favor of the governmental officer. The same principles and policy considerations were further refined and expanded in landmark cases of *Gregoire v. Biddle*, (2nd Cir. 1949) 177 F.2d 579, cert. denied, 339 U.S. 949 (1950) and *Barr v. Matteo*,⁷ 360 U.S. 564 (1959).

Despite the fact that *Gregoire* had been cited with approval in *Barr* and *Garrison v. Louisiana*, 379 U.S. 64 (1964), petitioners attempt to distinguish *Gregoire* on the grounds that it was not a Section 1983 case and negate its impact because it has allegedly been criticized. (K.-M. Br. 76-79) *Gregoire*, however, was cited with approval in *Norton v. McShane*, *supra*; *Martone v. McKeithen*, *supra*; and *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, (2nd Cir. 1972) 456 F.2d 1339, all of which were Section 1983 cases.

To show criticism of *Gregoire*, petitioners cite *Beauregarde v. Wingard*, (S.D. Cal. 1964) 230 F. Supp. 167; *Kelley v. Dunne*, (1st Cir. 1965) 344 F.2d 129; and *S & S*

⁷Judge Learned Hand's resolution of difficult public policy considerations is often quoted to show the justification for the application of immunity. The *Gregoire* reasoning was cited at length in *Barr*, *supra*. The best known passage is:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevita-

(footnote continued)

Logging Co. v. Barker, (9th Cir. 1966) 366 F.2d 617. *Beauregard* was a Section 1983 case and cited *Gregoire* at length (See: 230 F. Supp., 172-73) without criticism. *Kelley* was not a Section 1983 case and did not reject the viability of *Gregoire* but held that *Gregoire's* application was not warranted under the facts of *Kelley*. *S & S Logging Co.* was not a Section 1983 case but rather an antitrust action brought under the Clayton Act. *Gregoire* was approved and followed by the majority opinion.

Because of the obvious prejudicial impact of *Tenney v. Brandhove*, 341 U.S. 367 (1951), (holding that Congress, in enacting the Civil Rights Statutes, did not intend to abolish legislative immunity) and *Pierson v. Ray*, 386 U.S. 547 (1967) (holding that Congress, in enacting the Civil Rights Statutes, did not intend to abolish judicial immunity), petitioners are forced to argue that the Civil Rights Act of 1871 was intended *only* to reach actions of the executive branch of state government. (K.-M. Br. 75, Sch. Br. 31). Such a conclusion is totally without merit. Section 1983 clearly makes liable "every person" who under color of law deprives another person of his civil rights. Had Congress intended the Act to apply solely to executive actions, it could have easily drafted the Act to

ble danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." 177 F.2d 579, 581.

reflect such intention. This Court, in determining that members of the legislature and the judiciary are immune to actions brought under the Civil Rights Act, made some extremely difficult policy decisions having incredible impact on the very functioning of our system of government. This Court is again faced with a difficult question—should the Governor and Ohio's highest ranking military officers be immune to actions brought pursuant to Section 1983 for acts done within their discretion? The solution to this question axiomatically will have tremendous impact upon both the federal government and all Fifty States regardless of its resolution. If resolved in favor of the petitioners, respondents and those similarly circumstanced in the future would find themselves subject to the whims of a vindictive plaintiff's pen, while the judge who rules upon their cases and the legislator who creates the laws under which they act would be immune.

While many courts have attempted to resolve the question, respondents submit that the approach taken by the 9th Circuit in *Hoffman v. Halden*, *supra*, is perhaps the most rational:

"Since these Civil Rights actions lie in the federal courts and defendants are usually state officials, there are involved 'delicate state-federal relationships,' *Francis v. Lyman*, 1 Cir., 1954, 216 F.2d 583, 588."

"In *Stefanelli v. Minard*, 1951, 342 U.S. 117, at pages 121-125, 72 S. Ct. 118, at page 122, 96 L. Ed. 138, Justice Frankfurter after pointing out the 'far-flung and undefined range' of questions of procedural due process under the Civil Rights Acts, (342 U.S. at page 123, 72 S. Ct. at page 122) concludes with the enigmatic statement, 'To suggest these difficulties is to recognize their solution.' (342 U.S. at page 124, 72 S. Ct. at page 122)."

"To protect this 'delicate state-federal relationship' some limits must be placed on the otherwise limitless sweep of the Civil Rights Act."

"A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts."

"The approach of granting immunity to government officials for discretionary acts done within the scope of their authority, seems a proper one. Without the presence of a particular discriminatory intent they have no liability in any event. This approach says we will not inquire, subjectively—into their state of mind—where they are exercising a discretionary function." 268 F.2d 280, 299-300 (9th Cir. 1959).⁸

None of the respondents herein are alleged to have fired any shots fatal to petitioner's decedents. It is a well established principle of law that a public officer is not responsible for the negligence of subagents or servants properly employed by him in the discharge of his official duties.⁹ The crux of petitioners Section 1983 causes of action is that Respondent Rhodes should not have called out the national guard and the other respondents should have disobeyed the orders of their Commander-in-Chief and refused to appear at Kent State. With such precedents as *Mott*, *Luther*, *Moyer*, *Spalding*, *Gregoire*, and *Barr* holding

⁸*Infra* note 15

⁹*Robertson v. Sichel*, 127 U.S. 507 (1887); *German Bank v. United States*, 148 U.S. 573 (1893); *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F.2d 40, cert. denied, 314 U.S. 665 (1941); *Adams v. Pate*, (7th Cir. 1971) 445 F.2d 105; *Dunham v. Crosby*, (1st Cir. 1970) 435 F.2d 1177.

to the contrary, this Court would be hard pressed to conclude that the lower court erred in its executive immunity determination.

2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a wrongful death action brought under diversity jurisdiction?

Petitioners, in their complaints, assert a common law wrongful death cause of action apparently based upon a violation of Ohio Revised Code, Section 5923.37.¹⁰ Assuming, *arguendo*, that the trial court had subject matter jurisdiction over petitioners' diversity causes of action, still their complaints failed to state a claim upon which relief could be granted. To be applicable, Section 5923.37 requires that the wrongdoer be at the scene of the disorder and that his conduct be willful or wanton.

The uncontradicted affidavit of Respondent Del Corso attests to the fact that he was not at Kent State when petitioners' alleged causes of action arose and, therefore, he does not come within the purview of Section 5923.37. Likewise, the affidavit of Respondent Canterbury affirms that he did nothing to cause the fatal shots to be fired and, therefore, he is also outside this section. Further, Respondent White, as President of Kent State University, is certainly not a "member of the organized Militia".

Petitioners' complaints evidence that none of the re-

¹⁰Section 5923.37:

"When a member of the organized Militia is ordered to duty by State authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

spondents at bar fired the fatal shots. Members of the Ohio National Guard were agents of the State and not agents of the respondents. *Maryland v. United States*, 381 U.S. 41 (1965). Moreover, even if the members of the national guard were agents of the respondents, there is still no vicarious liability under a Section 1983 action. *Adams v. Pate*, (7th Cir. 1971) 445 F.2d 105; *Dunham v. Crosby*, (1st Cir. 1970) 435 F.2d 1177; II Harper & James, *Law of Torts*, §29.8, pp. 1633-34. The question of whether the actions of those who fired the shots were willful or wanton is clearly foreign to the issues presently before this Court.

The lower courts resolved the diversity question on the ground that the suits are barred by the Eleventh Amendment and Article I, Section 16 of the Ohio Constitution. Hence, any decision of the lower court with regard to Section 5923.37 would have been dicta and not determinative of the cases. It cannot be over emphasized that petitioners are not presenting a federal question by challenging the constitutionality of Section 5923.37 as repugnant to the United States Constitution, nor are petitioners challenging a lower court's interpretation of the statute as being in conflict with Ohio law. Although there are presently pending numerous Ohio state court wrongful death and personal injury actions arising out of the Kent State tragedy, no Ohio court has yet had the opportunity to interpret Section 5923.37. Surely, this Court is not the proper forum for this section's introduction to judicial scrutiny.¹¹

¹¹It is pertinent to note that petitioners attempted to distinguish *Moyer v. Peabody*, *supra*, on the grounds that the existence of a state of insurrection in the case presently before this Court is disputed (K.-M. Br. 64-66). Yet, petitioners devote an entire ARGUMENT (K.-M. Br., ARGUMENT IV, 80-83) to the proposition that they have a diversity cause of action based upon Section 5923.37, a necessary element of which is a showing that the wrongdoer was a member of the organized Militia ordered to duty by State authority during a time of public danger.

Finally, the law of Ohio is established that a public official cannot be held accountable for any act done while performing a function which requires the exercise of discretion. *Ramsey v. Riley*, 13 Ohio Rep. 157 (1844); *Stewart v. Southard*, 17 Ohio Rep. 402 (1848); *Gregory v. Small*, 39 Ohio St. 346 (1883); *Thomas v. Wilton*, 40 Ohio St. 516 (1884); *Reckman v. Keiter*, 109 Ohio App. 81, 164 N.E.2d 448 (1959); *Wierzbicki v. Carmichael*, 118 Ohio App. 239, 187 N.E.2d 184 (1963). Consequently, the lower court had a very solid legal foundation when it dismissed petitioners' diversity causes of action on the ground that they failed to state a claim upon which relief could be granted.

III. *The Trial Court Lacked Subject Matter Jurisdiction.* A. *Petitioners' Title 42 U.S.C. §1983, causes of action; Title 28 U.S.C. §§1331, 1343.*

The federal courts' lack of subject matter jurisdiction is, in most respects, unrelated to petitioners' failure to state a claim upon which relief can be granted. However, if this Court should determine the doctrine of executive immunity inapplicable to any one of the respondents, the trial court's lack of subject matter jurisdiction becomes even more compelling. This functional relationship is hereinafter demonstrated.

Although the immunity of the Federal Government is predicated upon the common law [See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 257, 293 (1821); *Dalehite v. United States*, 346 U.S. 15, 30 (1952)], and the immunity of the States to federal suit is established by the Federal Constitution (U.S. Const. amend. XI), traditionally these immunities are treated synonymously by this

Court¹² and the commentators.¹³ If either immunity were to be accorded priority, it would surely be the immunity of the States to federal suit found in the Supreme Law of the Land and inextricably affecting federalism. *Employees v. Missouri Public Health Dept.*, U.S. , 36 L.ed2d 251, 257, 262 (1973).

The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Notwithstanding a literal reading of the Eleventh Amendment, there is little question but that the Amendment prohibits federal courts from exercising jurisdiction over actions brought against an unconsenting State by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1889); *Duhne v. New Jersey*, 251 U.S. 311 (1919); *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *Employees v. Missouri Public Health Dept.*, U.S. , 36 L.Ed.2d 251 (1973).

The Eleventh Amendment, being the Supreme Law of the Land, cannot be diminished by Congressional enactment. *Hans v. Louisiana*, *supra*, 134 U.S., 10; *Smith v. Reeves*, 178 U.S. 436, 447-49 (1899); *Ex parte New York*, 256 U.S. 490, 497-98 (1920); *Parden v. Terminal R. Co.*, *supra*, 377 U.S., 186. Consequently, Congress could not and

¹²For instance, in *Dugan v. Rank*, 372 U.S. 609 (1963), a case involving the immunity of the Federal Government, this Court cited *Re New York*, 256 U.S. 490 (1921), an Eleventh Amendment case, to determine whether that action was in effect against the Federal Government (*Dugan v. Rank*, *supra*, 372 U.S., 620). See, *Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

¹³See, e.g., Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 23 (1963); Annot., 12 L.ed2d 1110, 1113 (1964).

did not expose the States to federal jurisdiction by enacting Section 1983 and the corollary jurisdictional provisions, 28 U.S.C. §§1331, 1343. *Monroe v. Pape*, 365 U.S. 167 (1961); *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Sires v. Cole*, (9th Cir. 1963) 320 F.2d877. Petitioners' historical analyses are not to the contrary.

Further, it is established that the Eleventh Amendment cannot be avoided by nominally naming, as defendant, a State's public officials when the essential nature and effect of the lawsuit affects the State. *Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 464 (1944); *Ex parte New York*, *supra*, 256 U.S., 500; *Re Ayers*, 123 U.S. 443, 492 (1887).¹⁴ The formulation of guidelines for determining if the nature and effect of a lawsuit affects the State has been previously characterized a "Procrustean task" by this Court. *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962). Nevertheless, certain rules have been defined and control the issue as presently posed.

This Court has stated the general rule that a public official may be sued individually if the acts complained of were outside the official's statutory authority and/or if the statutory authority under which the official acted, or is about to act, is challenged as repugnant to the Federal Constitution. *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 21 (1939); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 692 (1948); *Malone v. Bowdoin*, *supra*, 369 U.S., 646-47; *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *State of Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). If the lawsuit is predicated upon a public offi-

¹⁴Chief Justice Marshall in *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 204 (1824), first held that the Eleventh Amendment only barred suits to which a State was a party of record. This formalistic approach was later abandoned in *Governor v. Madrazo*, 26 U.S. (1 Pet.) 73 (1828), and finally repudiated in *Re Ayers*, 123 U.S. 443, 487-92 (1887).

cial's *ultra vires* acts, the plaintiff is required to set forth the statutory limitation upon which his lawsuit relies. *Larson v. Domestic and Foreign Commerce Corp.*, *supra*, 337 U.S., 690; *Malone v. Bowdoin*, *supra*, 369 U.S., 648 n. 9. The complaints at bar not only fail to set forth a specific statutory limitation but also fail to allege that any Ohio statute was violated. If such a contention had been made, it is clear that the allegation would have been frivolous.¹⁵ Further, the statutory warrant authorizing

¹⁵ Respondents not only acted pursuant to the Ohio statutes May 4, 1970, but further, the unchallenged Ohio statutory law obligated respondents to act. Specifically, the Ohio Constitution places upon the Governor of Ohio the responsibility of Commander-in-Chief of the Ohio National Guard (Ohio Const. art. III, sec. 10) and the obligation of appointing the Adjutant General and Assistant Adjutant General of the state's Militia (Ohio Const. art. IX, sec. 3). Further, the duty of appointing line and staff officers and ordering them to service when necessary "to execute the laws of the state, to suppress insurrection, and repel invasion," is posited with the Governor (Ohio Const. art. IX, sec. 4).

The statutory law of Ohio states that all commissioned officers of the Ohio National Guard shall be appointed by the Governor, and obligates all commissioned officers to swear their allegiance to the state, and to obey the orders of the Governor (Ohio Rev. Code §§5919.02, 5919.05). The Governor has the sovereign's sanction to order the Ohio National Guard, "to aid civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion . . ." (Ohio Rev. Code §§5923.21, 5923.231). No officer may refuse to appear when ordered by the Governor to suppress or prevent riot or insurrection (Ohio Rev. Code §5923.22) in accordance with the above. If an officer of the Ohio National Guard fails to obey the Governor's order, he may be fined \$1,000 or imprisoned six months, or both [Ohio Rev. Code §5923.99(A)].

Relative to the status and obligations of Respondent White, President of Kent State University, the statutory enactments of the sovereign designate the Kent State University a state institution (Ohio Rev. Code §3341.01) and vest its government in a board of trustees, appointed by the governor with the advice and consent of the senate [Ohio Rev. Code §3341.02(B)]. Further, this board of trustees is responsible to the sovereign for the election of a president and for the successful operation of the university. The President of Kent State University is, consequently, responsible to the State of Ohio through the board of trustees to do all things necessary for the proper maintenance and successful and continuous operation of such university (Ohio Rev. Code §3341.04).

respondents to act at the Kent State University is not challenged as repugnant to the Federal Constitution.

Assuming, *arguendo*, petitioners could have fairly placed their actions within the general rule, still the federal courts would not, *ipso facto*, obtain jurisdiction. This very point is made in *Larson v. Domestic and Foreign Commerce Corp.*, *supra*:

"Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22, 33 L.ed. 849, 10 S.Ct. 509 (1890)". (337 U.S., 691 n. 11)

Thus, in numerous cases asserting unconstitutional acts and naming public officials as party-defendants, this Court has looked behind the pleadings and determined that the suits' nature and effect would detrimentally affect the functions of government. See, *e.g.*, *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *Ex parte Ayers*, 123 U.S. 443 (1887); *North Carolina v. Temple*, 134 U.S. 22 (1890); *Louisiana ex rel. New York Guaranty and Indem. Co. v. Steele*, 134 U.S. 230 (1890); *Murray v. Williams Distilling Co.*, 213 U.S. 151 (1909); *Carolina Glass Co. v. South Carolina*, 240 U.S. 305 (1916); *Ex parte New York*, 256 U.S. 490 (1921); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Great Northern L. Ins. Co. v. Read*, 322 U.S. 47 (1944); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945). As petitioners' contend, many of these cases acknowledge that a public official may be sued for his individual wrongdoings. These decisions, however, all stand for the more basic

proposition that when the suit detrimentally interferes with the functions of government, federal courts are without jurisdiction of the subject matter. The relevant distinction is defined by this Court in *Larson v. Domestic and Foreign Commerce Corporation*, *supra*.

Obviously, under common agency law, assuming no personal immunities, an agent may always be sued for his individual wrongdoings. The right to sue Ohio's officials, however, is not the issue presently being considered. The issue here is whether these particular actions are, in effect, suits against Ohio. If they are, the actions must fail whether or not the officers might otherwise be suable (paraphrasing this Court's language in *Larson*, 337 U.S., 687).

Plaintiff, in *Larson*, countered by arguing that tortious, illegal acts could not properly be attributable to the government and consequently, the lawsuit would not affect the United States. This Court answered:

"We believe the theory to be erroneous. It confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action. It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is 'illegal' in the sense that the respondent suggests. If he does not, he has not stated a cause of action. This is true whether the conduct complained of is sovereign or individual. In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to

be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

"It is argued, however, that the commission of a tort cannot be authorized by the sovereign. Therefore, the argument goes, the allegation that a Government officer has acted or is threatening to act tortiously toward the plaintiff is sufficient to support the claim that he has acted beyond his delegated powers. It is on this contention that the respondent's position fundamentally rests, since it is admitted that, if the action to be prevented or compelled is authorized by the sovereign, the demand for it must fail as a demand against the sovereign. It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent's action, because tortious, is, for that reason alone, ultra vires his authority." (337 U.S., 692-94; emphasis added)

Rather than attacking respondents' authority for action, petitioners challenge respondents' discretionary acts com-

mitted within the unchallenged scope of their governmental agency. Again, in *Larson*, this Court rejects the argument that incorrect decisions within the scope of governmental duty vests the federal courts with jurisdiction:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign." (337 U.S., 695)

See also: *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *United States on the Relation of Hall v. Payne*, 254 U.S. 343, 347-48 (1920); *Adams v. Nagle*, 303 U.S. 532, 542 (1938).

The reality that respondents' acts were within their valid statutory authority is easily demonstrated. Assume respondents had been ordered to Kent State under the same statutory authority as on May 4, 1970. Assume further that a sniper was unquestionably present atop a university building and had killed many persons. Assume further that one of the respondents had ordered a National Guard marksman to shoot the sniper which mission was thereafter accomplished. Under these facts, with the Ohio National Guard officer and marksman functioning under the identical statutory warrant, there is little doubt but that the officer could not be sued by the sniper or his estate pursuant to a Section 1983 cause of action. The point to be made is simple. Petitioners' actions do not challenge

respondents' authority to act but rather their discretionary acts within valid statutory authority.

The *Larson* Court, as an example of an instance when governmental immunity would not be applicable, cites the purchase of a personal home by the government's agent (337 U.S., 689). Since this purchase would not be within the scope of governmental duty, clearly the government's immunity would be irrelevant. Similarly, personal misconduct by respondents during their civilian activities would negate any viability of governmental immunity. Petitioners' actions, however, arose from an incident occurring when the respondents were performing their obligatory governmental duties and consequently the detrimental effect to the State of Ohio resulting from petitioners' lawsuits is pivotal to the federal court's subject matter jurisdiction.

In the case of *Dugan v. Rank*, 372 U.S. 609 (1963), this Court summarized the relevant criteria for determining when a lawsuit, brought nominally against individual public officials, is by its essential nature and effect a suit against the government and barred by the government's immunity.

"The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738, 91 L.Ed. 1209, 1215, 67 S.Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Commerce Corp.*, *supra* (337 U.S. at 704); *Re New York*, 256 U.S. 490, 502, 65 L.Ed. 1057, 1062, 41 S.Ct. 588 (1921)." (372 U.S., 620; emphasis added)

It is important to note that these "tests" are stated in the disjunctive, and therefore, if any one of the standards is met in a given case, the suit must be held to be against the government. Interwoven among all of these various formulations is a central, definable theme. Namely, the suit will be considered against the government if, as a product thereof, there will result serious interference with governmental functions. This controlling theme throughout past decisions is identified in *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944):

"[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler v. Dix*, 194 U.S. 590, 48 L.Ed. 590, 24 S.Ct. 766; *Fitts v. McGhee*, 172 U.S. 516, 529, 43 L.Ed. 535, 541, 19 S.Ct. 269; *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 167, 53 L.Ed. 742, 750, 29 S.Ct. 458; *Lankford v. Platte Iron Works Co.*, 235 U.S. 461, 468, *et seq.*, 59 L.Ed. 316, 318, 35 S.Ct. 173; *Re New York*, 256 U.S. 490, 500, 65 L.Ed. 1057, 1062, 41 S.Ct. 588; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296, 299, 82 L.Ed. 268, 273, 275, 58 S.Ct. 185."

See also: *United States v. Lee*, 106 U.S. 196, 206 (1882); *Land v. Dollar*, 330 U.S. 731, 738 (1947). Indeed, this theme from past analogous cases is crucial to the achievement of the object and purpose underlying the Eleventh Amendment as defined by this Court in *Re Ayers*, 123 U.S. 443, 505-506 (1887):

"The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not

been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In accordance with the established law set forth above, the Eleventh Amendment prohibited the trial court from exercising jurisdiction over petitioners' causes of action.

Before the trial court, when ruling upon respondents' Rule 12b(1), motions to dismiss, was the factual matter alleged in petitioners' complaints and contained in the Executive Proclamations attached to the motions (STATEMENT OF CASE, pp 11-13 *supra*). Also, present in the trial court was the law of Ohio defining the legal obligations of respondents to the government.¹⁶ The trial court, weighing these realities (ARGUMENT, I.A. pp 15-17 *supra*) concluded that it was without subject matter jurisdiction. This judgment was entirely consistent with the prior decisions and reasoning of this Court, and demanded by the Eleventh Amendment.

Ohio would be restrained from acting, and the public administration of the law greatly curtailed if the federal courts were to assume jurisdiction over petitioners' causes of action. Although not factually identical, the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, (2d Cir. 1949) 177 F.2d 579, attests to these dire effects:

¹⁶*ibid.*

"... it is impossible to know whether the claim is well founded until the case has been tried, and ... to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." (177 F.2d, 581)

In the case of *Barr v. Matteo*, 360 U.S. 564 (1959), this Court recognized the inevitable restraint on the government generated by lawsuits against the government's agents:

"We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. (360 U.S., 564-65)

* * *

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the

fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: (Quoting *Gregoire v. Biddle*, *supra*) (360 U.S., 571).

* * *

"It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings. (360 U.S., 576)"

Under the reasoning of *Gregoire* and *Barr*, the State of Ohio would be restrained from acting in time of rampage and insurrection, and the public administration of this government's laws would be greatly impeded if the federal courts were to assume subject matter jurisdiction over petitioners' causes of action. On balance, before the trial court, was the State of Ohio's ability to protect life and property within her bounds.¹⁷

¹⁷The realities confronting Ohio's public officials, and consequently the State of Ohio, if federal courts were to exercise subject matter jurisdiction over actions such as these is, perhaps, best demonstrated by the instant cases. Captain Srp is isolated as a fair example although any one of the respondents is similarly situated.

Captain Srp, a man of no extraordinary wealth or position, is presently named as a party defendant in eleven federal lawsuits
(footnote continued)

This Court, on numerous occasions, has identified the most important function of government to be providing security for the citizenry and the protection of their property. For instance, in *Sterling v. Constantine*, 287 U.S. 378 (1932), the Court stated:

"As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence." (287 U.S., 399)

See, also, *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (dissenting opinion, White, J.); *Lanzetta v. New Jersey*, 306 U.S. 451, 455 (1939); *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849). Certainly, if a State's treasury (*Ford Motor Co. v. Treasury Department*, *supra*) and freedom of contract (*Ex parte New York*, *supra*) are protected, the highest function of the State must be even more zealously insured.

If in times of insurrection and emergency demanding discretionary acts, Ohio's public officials, functioning under their unchallenged obligation to the state, could, at the stroke of a vindictive plaintiff's pen, be subjected to the threats of hindsight and *ex post facto* speculation, Ohio would be hard pressed to find responsible officials to act. This reality, manifest in the trial court and court of appeals, prohibited the federal courts from acquiring subject matter

arising out of the Kent State incident. The total amount of potential judgments against Captain Srp is \$41,000,000, together with punitive damages which the federal court is asked to value. Additionally, Captain Srp and his family have been subjected to public harassment and serious interference with their daily lives. No great imagination is necessary to conclude that Captain Srp, and those public officials who hear of a precedent permitting these actions to go before a jury, will be hesitant to act on behalf of the State of Ohio, or perhaps, ignore completely the call to duty.

jurisdiction over petitioners' actions. If this Court were to determine the doctrine of executive immunity not available to shield Ohio's executive officials from the inevitable lawsuits, the adverse effects upon the State become even more demonstrable.

Rather than departing from the established law, the lower courts' judgment was mandatory: under the facts at bar; in accordance with the Eleventh Amendment; the object and purpose behind this Amendment; and the tests announced by this Court in *Dugan v. Rank*, *supra*. The trial court, balancing the facts at bar, was bound by the Supreme Law of the Land.

Petitioners call this Court's attention to *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young*, and its progeny, established a very narrow rule. That case stands for the limited proposition that:

"... individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and *who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.*" (*Ex parte Young*, *supra*, 209 U.S., 155-56; emphasis added). See: *Employees v. Missouri Public Health Dept.*, U.S. , 36 L.Ed.2d 251, 272 (1973).

Previously, respondents identified the general rule that public officials may be sued if (1) their acts are outside statutory warrant or if the statutory warrant under which they act, or are about to act, is alleged repugnant to the Federal Constitution; and (2) the lawsuits will not seri-

ously interfere with governmental functions, determined by their nature and effect. If a case comes within the narrow rule of *Ex parte Young*, interference with governmental functions is not considered although obviously the government's activities are blocked. [209 U.S., 174 (J. Harlan, dissenting)]. The fiction of *Ex parte Young* is set forth in the decision:

"... The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." (209 U.S., 159)

The essence of the *Ex parte Young* fiction is that the public official had *no authority* from the State to enforce an unconstitutional statute. The cases at bar are not within the fiction since respondents acted at Kent State pursuant to statutory authority not challenged as being repugnant to the Federal Constitution. Respondents' authority to act in the name of Ohio is not in issue. The *Ex parte Young* rule is not relevant to the Eleventh Amendment issue now before this Court. The lower courts properly considered the interference with governmental functions resulting from petitioners' lawsuits nominally against Ohio's public officials.

The same irrelevancy to the circumstances at bar characterize the cases cited by petitioners as endorsing *Ex parte Young*. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891) (suit to enjoin the enforcement of an unconstitutional State statute); *Prout v. Starr*, 188 U.S. 537 (1903) (suit

to enjoin the enforcement of an unconstitutional State statute); *General Oil Co. v. Crane, Inspector of Coal Oil*, 209 U.S. 211 (1908) (suit to enjoin the enforcement of an unconstitutional State statute); *Sterling v. Constantine*, 287 U.S. 378 (1932) (suit to enjoin State official's acts allegedly outside statutory warrant, or in alternative, unconstitutional State statutes); *Baker v. Carr*, 369 U.S. 186 (1962) (suit for declaration that state apportionment act was unconstitutional and to enjoin further elections under the act); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (suit for declaration alleging that the state apportionment act was unconstitutional and to enjoin further elections thereunder); *Griffin v. School Bd. of Prince Edward*, 377 U.S. 218 (1964) (suit to enjoin payment of public funds to segregated schools).

In footnote to *Gilligan v. Morgan*, U.S. , 37 L.Ed.2d 407 (1973), this Court's majority opinion affirms that federal courts are empowered to adjudicate claims for injury caused by military intrusions into society's civilian sector. (37 L.Ed., 416 n. 16). Three cases are cited in support of this general statement. None of the cases is contrary to respondents' position and all endorse respondents' approach to Eleventh Amendment question.

Duncan v. Kahanamoku, 327 U.S. 304 (1946), considered the authority of military tribunals under Section 67 of the Hawaiian Organic Act. Petitioners, via writs of habeas corpus, alleged that the public officials, acting under the guise of Section 67, had acted *ultra vires*, exceeding the scope of their statutory warrant, or in the alternative, petitioners alleged that Section 67 was unconstitutional. Clearly, *Duncan* comes within the fiction of *Ex parte Young*, *supra*, making an inquiry as to the effect upon the government irrelevant.

Likewise, *Sterling v. Constantine*, 287 U.S. 378 (1932), is within the *Ex parte Young* tradition. In *Sterling*, this Court was presented an injunctive action asking that public officials be enjoined from enforcing limits upon the production of oil. It was again alleged that the ordering of quotas was beyond the public officials' statutory authority, or in the alternative, that the statutory warrant was repugnant to the Federal Constitution.

Finally, *Laird v. Tatum*, 408 U.S. 1 (1972), presented an injunctive action alleging that the surveillance programs of the Army were *ultra vires* its Congressionally assigned mission, 10 U.S.C. §331. The majority decision in *Laird* considered the facts as presenting neither case nor controversy. Consequently, it was not necessary for the Court, presented acts allegedly outside statutory authority, to determine if the nature and effect of the suit against public officials interfered with basic governmental functions.

Duncan, *Sterling* and *Laird* do not defeat respondents' Eleventh Amendment argument. *Duncan* and *Sterling* are within the narrow rule of *Ex parte Young*. Although *Laird* is not within the *Ex parte Young* rule, this Court's holding of non-justiciability made the nature and effect test irrelevant to the case's final disposition.

Petitioners contend that the implementing language of the Fourteenth Amendment modifies the Eleventh Amendment, enabling Congress to provide federal jurisdiction over the States. (Sch. Br. 23-24, K.-M. Br. 29-30). Not only is this bold assertion unprecedented but it runs amiss well-known rules of construction and historical logic.

In 1868, when the Fourteenth Amendment was adopted, the Eleventh Amendment had governed seventy years. The realities of the Amendment, as defined by this Court, were certainly known to the drafters of the Fourteenth Amend-

ment, as were the circumstances of its birth. This Court in *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890), recounted the occasion:

"... *Chisholm v. Georgia*, [holding that a State was liable to suit by a citizen in federal court under the Constitution as originally drawn, 2 U.S. (2 Dall.) 419 [1793]] ... created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the Legislatures of the States."

If it had been the plan of the Fourteenth Amendment to diminish the scope of the Eleventh Amendment, certainly the intent would have been clearly expressed, and not relegated to implication and conjecture.

Further, Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." (Emphasis added) The phrase, "by appropriate legislation," was a limitation upon the authority of Congress, limiting Congress to that legislation consistent with the then existing constitutional provisions and amendments. To hold otherwise, would result in the phrase being superfluous. Legislation opposed to the earlier, explicit constitutional mandates of the Eleventh Amendment and Article III [*Cf. Employees v. Missouri Public Health Dept.*, U.S. , 36 L.Ed.2d 251, 260-62 (1973) (concurring opinion)] would, indeed, be inappropriate.

This interpretation of Section 5, Fourteenth Amendment, is confirmed by *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In *Katzenbach*, this Court referred to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which

Chief Justice Marshall defined the perimeters of the Necessary and Proper Clause, Art I, §8, cl 18, thusly:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." (17 U.S., 421; emphasis added.)

After quoting Chief Justice Marshall, Katzenbach places the *M'Culloch* boundaries on Section 5, Fourteenth Amendment:

"Thus, the *M'Culloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under §5 of the Fourteenth Amendment." (*Katzenbach v. Morgan*, *supra*, 384 U.S., 651)

Finally, petitioners' proposition runs against this Court's past decisions rendered in close proximity to the adoption of the Fourteenth Amendment. For instance, the fiction of *Ex parte Young*, *supra*, and its progeny, become irrelevant if Congress possessed the authority to subject States to federal jurisdiction. Section 5 of the Fourteenth Amendment has not given Congress the extraordinary authority to diminish the Eleventh Amendment absent consent of the State.

The Scheuer brief, however, calls three cases to the attention of this Court. Initially, in *Parden v. Terminal R. Co.*, *supra*, this Court affirmed the viability of the Eleventh Amendment. Thereafter, it was held that when the States consented to Congressional regulation of interstate commerce, the States also consented to Congress authorizing the federal courts' jurisdiction over FELA cases. *Employees v. Missouri Public Health Dept.*, *supra*, delineated the bounds of *Parden*. Again in *Employees*, this Court affirmed its past Eleventh Amendment decisions and

thereafter limited *Parden's* potential reach. Specifically, *Employees* refused to find Congressional intent to subject the States to federal jurisdiction over matters involving interstate commerce absent clear statutory intent. Thus, even assuming for argument that Section 5 of the Fourteenth Amendment gave Congress the authority to subject the States to federal jurisdiction, the language of Section 1983 fails to show the mandatory Congressional intent to achieve this end. The judiciary is not at liberty to "recast this statute to expand its application beyond the limited reach Congress gave it." *District of Columbia v. Carter*, 409 U.S. 418, 433 (1973).

Katzenbach v. Morgan, *supra*, is cited for a last-ditch assertion:

"... [E]ven if the Fourteenth Amendment would not itself abrogate an interpretation of the Eleventh Amendment which closed the federal courts to suits against State officers, the Congress had the power to do so, . . . and, in fact, intended to do so." (Sch. Br. 24)

In the first instance, *Katzenbach* considered a conflict between a State's statutory voting right requirements and the preemptive character of federal legislation in the same area. *Katzenbach* did not present a conflict between the Eleventh Amendment and Section 5 of the Fourteenth Amendment.

Secondly, petitioners' statement completely misses the thrust of respondents' Eleventh Amendment argument. Under this argument, respondents do not contend that Congress was without authority to create a federal cause of action against State public officials. Rather, it is respondents' position that Congress neither had the power nor the intention to subject the States to federal jurisdiction

when enacting Section 1983. Hence, since these suits are in reality against Ohio, brought only nominally against Ohio's public officials, their circumstances are foreign both to Congressional authority and desire.

Petitioners argue that federal jurisdiction over petitioners' actions is required by this Court's decision, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); specifically, every right constitutionally demands a remedy. (Sch. Br. 24-26, K.-M. 53-57). The case does not stand for this broad assertion. *Bivens* held that a citizen's Fourth Amendment right to be free from unreasonable searches and seizures by federal agents included a federal cause of action for damages occasioned by the federal agents' unconstitutional conduct. Respondents do not argue that petitioners have no federal cause of action. Respondents' argument is, rather, that the federal courts have no subject matter jurisdiction in that petitioners' Section 1983 causes of action are in essence against Ohio. Clearly, this Court, in *Bivens*, was not presented an issue pertaining to subject matter jurisdiction over the Federal Government, much less an issue of subject matter jurisdiction over a State *vis-à-vis* the Eleventh Amendment. Likewise, *District of Columbia v. Carter*, *supra*, does not concern this relevant issue.

Underlying this Court's decision in *Bivens*, and consequently petitioners' argument based upon it, is the statement by Chief Justice Marshall found in *Marbury v. Madison*, 5 U.S. (1 Cranch) 60, 69 (1803):

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Obviously, by these words, Chief Justice Marshall did not intend that civil liberty included the right to sue a State for in *Osbourn v. United States Bank*, 22 U.S. (9 Wheat.) 204 (1824), Marshall applied the Eleventh Amendment.¹⁸

In *Palmer v. The State of Ohio*, 248 U.S. 32 (1918), this Court responded to petitioners' assertion that the Fourteenth Amendment guarantees an effective remedy; (K.-M. Br. 53-57) i.e., both a cause of action and a court with competent, subject matter jurisdiction:

"The right of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution, or laws of the United States. It can come only from the consent of the state. *Beers v. Arkansas*, 20 How. 527; *Railroad Co. v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1." (248 U.S., 33)

See also: *Krause, Admr. v. Ohio*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), appeal denied, 34 L.Ed.2d 506 (1972), pet. for reh. denied, 35 L.Ed.2d 280 (1973).

Further, all petitioners intimate that the State of Ohio has effectively foreclosed any state court remedy for their damages. (Sch. Br. 25, K.-M. 40-41) This is simply not true. Section 5923.37, Ohio Revised Code, provides:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

Today, lawsuits, arising from the Kent State incident, are pending in the Common Pleas Court of Cuyahoga County,

¹⁸Supra note 14.

Ohio, alleging both willful and wanton misconduct.¹⁹ Respondents, along with other agents of the State of Ohio are named party-defendants. Consequently, any argument predicated upon a lack of effective remedy is not ripe for adjudication. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

B. *Petitioners' Wrongful Death Causes of Action; Title 28 U.S.C. §1332.*

Initially, respondents incorporate, herein, the first section of this argument (ARGUMENT, III, A., pp. 38-61

¹⁹Common Pleas Court of Cuyahoga County, Ohio, Civil Case Nos. 894,442 and 905,792, captioned: No. 894,442, *Dean Kahler, Elaine Kahler, Joseph Lewis, Elizabeth Lewis, Arthur Krause, etcetera v. Governor James Rhodes, Sylvester Del Corao, Robert Canterbury, Lt. Col. Charles Fassinger, Capt. Raymond J. Srp, Lt. Roy W. Dew, Lt. Alexander Stevenson, Sgt. Mike Pryor, Sgt. Rudy Morris, SP/4 Ronald West, Major Harry D. Jones, Capt. John E. Martin, Capt. James R. Snyder, Lt. Fallon, Lt. Klein, Sgt. Robert James, Sgt. Leon Smith, Sgt. Richard Love, Sgt. Dale Amtram, Sgt. James Farriss, Sgt. Dennis Breckenridge, Sgt. Michael DeLaney, Sgt. Lawrence Shafer, Sgt. Barry Morris, Sgt. Snure, Sgt. McManus, SP/4 Gerald Lee Scalf, SP/4 Russell Repp, SP/4 James Pierce, SP/4 Ralph Zollar, SP/4 James McGee, SP/5 Gordon R. Bedall, William Herschler, David Rogers, Paul Navjoks, Lonnie D. Hinton, Phillip D. Raber, Paul Zimmerman, Richard Shade, and two-hundred "John Doe" defendants.*

No. 905,792, *Louis Schroeder, Elaine Miller, etcetera, Douglas Wrentmore, Alan Canfora, John R. Cleary, Thomas Grace, Donald MacKenzie, and James Russell v. Governor James Rhodes, Sylvester Del Corao, Robert Canterbury, Lt. Col. Charles Fassinger, Capt. Raymond J. Srp, Lt. Roy W. Dew, Sgt. Mike Pryor, Sgt. Rudy Morris, SP/4 Ronald West, Major Harry D. Jones, Capt. John E. Martin, Capt. James R. Snyder, Lt. Fallon, Lt. Klein, Sgt. Robert James, Sgt. Leon Smith, Sgt. Richard Love, Sgt. Dale Amtram, Sgt. James Farriss, Sgt. Dennis Breckenridge, Sgt. Michael DeLaney, Sgt. Lawrence Shafer, Sgt. Barry Morris, Sgt. Snure, Sgt. McManus, SP/4 Gerald Lee Scalf, SP/4 Russell Repp, SP/4 James Pierce, SP/4 Ralph Zollar, SP/4 James McGee, SP/5 Gordon R. Bedall, William Herschler, David Rogers, Paul Navjoks, Lonnie D. Hinton, Phillip D. Raber, Paul Zimmerman, Richard Shade, and two-hundred "John Doe" defendants.*

infra) since Ohio's Eleventh Amendment immunity to suit is dispositive of not only petitioners' Section 1983 causes of action but also petitioners' wrongful death actions brought pursuant to the federal courts' diversity jurisdiction. In addition, the immunity of Ohio, under the Ohio substantive law, is controlling in Ohio's federal fora. Title 28 U.S.C. §1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Article I, Section 16 of the 1851 Constitution of Ohio, as amended in 1912, states in relevant part:

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Recently, in another lawsuit arising out of the Kent State tragedy, this Court and the Supreme Court of Ohio, had occasion to consider this provision of the Ohio Constitution. In the case of *Krause, Admr. v. Ohio*, 31 Ohio St. 2d 132, 285 N.E. 2d 736, appeal denied, 34 L.Ed.2d 506 (1972); pet. for reh. denied, 35 L.Ed.2d 280 (1973), the Ohio Supreme Court ruled in its syllabus:

"1. The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102; *Palumbo v. Indus. Comm.*, 140 Ohio St. 54, 42 N.E.2d 766; *State, ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82; and *Wolf v. Ohio State Univ. Hospital*, 170 Ohio St. 49, 162 N.E.2d 475, approved and followed.)

* * *

"3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, which provides that ' * * * Suits may be brought against the state in such courts and in such manner, as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such

suit. (*Raudabaugh, Palumbo, Williams and Wolf, supra*, approved and followed.)

"4. Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Therefore, even ignoring the Eleventh Amendment, it is established, and recently confirmed, that Ohio is immune to suit in its state courts. Consequently, under the same Ohio law, the State cannot be sued in the United States District Courts sitting in Ohio.

The Ohio case of *State, ex rel. Williams, v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947) is analogous to the federal law affirmed in *Dugan v. Rank, supra*. In *Glander*, the Ohio Supreme Court, quoting and adopting 42 *American Jurisprudence*, 304, Section 92, stated the Ohio test for determining when an action is against the State, brought through nominal party defendants:

"While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the state is a necessary party defendant, and if it cannot be made a party, that is, if it has not consented to be sued, the suit is not maintainable. The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court.'" (*State, ex rel. Williams, v. Glander, supra*, 148 Ohio St., 193).

Under analogous reasoning as that contained in *Gregoire v. Biddle, supra*, and *Barr v. Matteo, supra*, it is apparent that, pursuant to the tests defined in the *Glander* case, Ohio is "vitally interested" in petitioners' diversity actions, and that "the rights [and obligations] of the state would be directly and adversely affected by the judgment." Hence, in accordance with the established law of Ohio, the State is immune to petitioners' diversity causes of action.

C. Section 5923.37, Ohio Revised Code.

Referring to Section 5923.37, Ohio Revised Code, petitioners declare that "this statute supercedes and waives any immunity otherwise available to the State of Ohio (K.-M. Br. 81)." Section 5923.37 provides:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil lawsuit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct." (Emphasis added)

The rule of construction, under both the federal and state law, is established that alleged statutory consents of the sovereign to suit are to be strictly construed. See, e.g., *Ford Motor Co. v. Treasury Department, supra*, 323 U.S., 465; *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Lee Turzillo Contr. Co. v. Cincinnati Met. Hous. Auth.*, 10 Ohio St.2d 5, 225 N.E.2d 255 (1967). Obviously, the subject of Section 5923.37, Ohio Revised Code, is "a member of the organized militia"; not the State of Ohio. Even the most strained construction of this section, that still borders legitimacy, could not result in the section constituting Ohio's waiver of its Eleventh Amendment

immunity to suit, nor the immunity constitutionalized by Article I, Section 16, Ohio Constitution.

Petitioners conclude:

"... Moreover, to the extent that Ohio seeks to claim sovereign immunity . . . , the application of the doctrine of sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf, the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause, Admr. v. State of Ohio*, *supra* (31 Ohio St.2d 132, 285 N.E.2d 736 (1972))." (K.-M. Br. 82)

This argument has previously been foreclosed by this Court's dismissal of the appeal in *Krause, Admr. v. Ohio*, *supra*, for want of a substantial federal question (34 L.Ed. 2d 506).

Today, from all corners, come serious challenges to the propriety of governmental immunity. Unquestionably, many of the historic justifications are vulnerable to attack. A predication of the immunity of government to suit upon the oft-quoted statement, "The King can do no wrong," is indeed absurd in modern-day America. So too, Justice Holmes' reliance upon Bodin's syllogism to justify the immunity strikes a dissonant note of unfairness in the late Twentieth Century; the logical proposition that there can be no legal right against the authority that makes the law upon which the right depends is a questionable basis. [*Kawananakoa v Polyblank*, 205 U.S. 349, 353 (1907).]

Respondents' position is neither lodged in the abstract nor upon antiquated notions. To the contrary, respondents' endorsement of Ohio's governmental immunity to petitioners' suits is premised upon the utilitarian justification that there must be no serious interference with the most

important function of government—effective law enforcement. Of course, in our country, every individual is sovereign. *Employees v. Missouri Public Health Dept.*, *supra*, 36 L.Ed.2d, 278 (dissenting opinion). In the same vein, Government is nothing more than the collective group of individual sovereigns; Government is not an impersonal, beastly entity. On the scales before the Court are the rights of three sovereign citizens to be balanced against the right of all sovereign citizens to effective law enforcement. A pragmatic reading of the balance favoring the collective sovereigns' interests is not foreign to the democrats' social contract.

IV. *The Allegations of Petitioners' Complaints Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Judiciable Political Questions.*

Petitioners' complaints allege that respondents ordered improperly trained and inappropriately armed troops to Kent State University resulting in the deaths of their decedents.²⁰ The issues raised by these allegations are non-justiciable as previously determined by this Court in the analogous case of *Gilligan v. Morgan*,²¹ U.S. , 37 L.Ed.2d 407 (1973).²¹

Although in *Flast v. Cohen*, 392 U.S. 83, 95 (1968), this Court acknowledged the concept of "justiciability" to be of uncertain meaning and scope, the bounds of the political question doctrine have been previously delineated. Justice Brennan in *Baker v. Carr*, 369 U.S. 186 (1962), identified

²⁰E.g., Krause Complaint, First Cause of Action, paragraphs 9-10 and Second Cause of Action, paragraphs 3-4 (K-M. App. 3-8).

²¹Respondents, under this portion of their argument do not advocate, nor has the lower appellate court held (Sch. Pet. 17a-19a), that petitioners' complaints be dismissed *in toto* for non-justiciability. Rather, respondents contend that petitioners' allegations challenging the appropriateness of the Ohio National Guard's training and weaponry raise political questions, and therefore are properly dismissed.

six elements which historically have lead to a determination of non-justiciability pursuant to the political question doctrine:

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (369 U.S., 217)

As indicated in *Baker* (369 U.S., 217), the presence of any one of these elements, justifies the case's dismissal as a function of separation of power. In the instant cases, all of the defined elements are inextricably involved in petitioners' allegations challenging the propriety of the Ohio National Guard's training and weaponry.²²

First, there exists a textually demonstrable constitutional commitment of the issue to a coordinate political

²²Of course, the cases at bar neither involve voting rights as in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), nor the rights of prisoners as *Harris v. Kerner*, 404 U.S. 519 (1972). Consequently, the traditional indicia for determining non-justiciability pursuant to the political question doctrine are viable and controlling. Cf. *Gilligan v. Morgan*, U.S. , 37 L.Ed.2d 407, 416 (1973).

department. Art I, §8, cl 16, United States Constitution, vests in Congress the power:

"To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to each State respectfully, the appointment of Officers, and the authority of training the Militia according to discipline provided by Congress." (Emphasis added)

In *Gilligan v. Morgan*, *supra*, this Court determined that Art I, §8, cl 16 "... is explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia..." (37 L.Ed.2d, 413). After demonstrating the legislature's enactments pursuant to the authority of Art I, §8, cl 16, Chief Justice Burger concluded:

"... The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. The Guard also may be federalized in addition to its role under state governments, to assist in controlling civil disorders. The relief sought by respondents [injunctive and supervisory relief], requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of Government." (37 L.Ed.2d, 413-14)²³

²³For a comprehensive discussion of the origins of the National Guard, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940). In the late Eighteenth century the militia was "a home-defense force, composed of most able-bodied men." Wiener, *supra*, 54 Harv. L. Rev. at 182. Most of the nation's military problems during the late Eighteenth and early Nineteenth centuries were dealt with by the militia and not by a standing army. During this time, however, the deficiencies of the militia became notorious (footnote continued)

Secondly, the Judicial Branch lacks both the physical capabilities and academic skills to define standards upon which to gauge the propriety of training and weaponry provided the Ohio National Guard. Adequate machinery to test, observe, and thereafter evaluate alternative weapons and training techniques are not available to the judiciary. Further, the judiciary has neither the prerogative nor time to conduct non-adversary, investigatory hearings demanded to rationally resolve the administrative issues raised by petitioners.

Not only is the Judicial Branch physically ill-suited to isolate appropriate standards upon which to adjudge the Ohio National Guard's training and weaponry but the judiciary is limited to a narrow field of legal expertise. Inquiries into and solutions to the military questions raised by petitioners' allegations are foreign to the judicial arena of competence. A federal trial court would indeed be hard pressed to fairly instruct a jury on the military questions raised herein. Equally, if not more precarious, would be the plight of twelve laymen when called upon to make technical, factual determinations concerning the appropriateness of the training and weaponry provided the States' Army National Guard components by the Department of Army. Clearly, the policy determinations demanded by petitioners' military issues are of a character for non-judicial discretion.

—for example, many militiamen refused to fight outside their own state—and an expansion of the regular army gradually took place. The first modern institutional reforms were introduced by the Army Reorganization Act of 1901, 31 Stat. 748, which established a regular army "suited to the requirements of the United States as a world power" (54 Harv. L. Rev. at 193), and the Dick Act of 1903, 32 Stat. 775, which "provided for an Organized Militia, to be known as the National Guard, which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors" (54 Harv. L. Rev. at 195).

Referring to several examples of civil disturbance publications that could be considered by a trial court as authoritative when attempting to resolve military questions, this Court stated:

"This [a trial court surveying the motley group of publications and authorities] would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited may represent only a fragment of the accumulated data and experience in the various States, in the armed services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day to day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility, even in the unlikely event that he possessed requisite technical competence to do so." (*Gilligan v. Morgan, supra*, 37 L.Ed.2d, 414).

Thirdly, an isolated judicial precedent within the non-judicial bailiwick would generate myriad questions and stymie effective law enforcement. For instance, could the Department of Army modify, and perhaps improve, the judicially endorsed standards resulting from the trial of these military issues? Would a judicial precedent under the isolated circumstances before the Court control future campus disturbances presenting factual realities not identical to those of May 4, 1970? If the judicial determinations herein and Department of Army regulations conflicted, which directives would control? Would the judiciary be required to supervise the weekend drills and summer

encampments of the Army National Guard to assure judicial standards were carried out? Who would determine, in the heat of insurrection, if the then-present riotous situation fell within the facts and precedent established by these cases?

These questions are raised to demonstrate the quagmire upon which future military commanders, the Department of Army, and the judiciary would be placed if this Court were to hold petitioners' allegations justiciable. In dealing with civil disorder the government must be able to act immediately and confidently lest the delay and doubt insure the success of the insurgency. This vital assurance and split second flexibility demanded by military confrontations are not characteristics of our relatively rigid legal system bound by the ties of narrowly drawn precedent.

A judicial determination herein would indicate disrespect for the Legislative and Executive Branches of government. As heretofore demonstrated, Congress is vested by the Constitution with authority and the responsibility for training and providing weapons to members of the national guard. The President also has been delegated the responsibility of prescribing regulations controlling these matters. A judicial review into the propriety of the coordinate branches' decisions would express disrespect and a lack of confidence in the Legislative and Executive Branches of government to wisely and faithfully fulfill their assigned duties.

Finally, decision by the judiciary would also create the potentiality of multifarious, and even conflicting pronouncements by the various branches on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. See, e.g., 32 U.S.C. §501, *et seq.*, and 32 U.S.C. §701, *et seq.* Congress may enact new statutes

or amend existing statutes in the future. The President has prescribed regulations concerning the training of the national guard; he also may prescribe new regulations on the subject in the future. If courts attempt to evaluate the training and weaponry of the national guard, there is an eminent possibility that such a mandate would conflict with either existing or future directives from Congress and/or the President.

In the case of *Orloff v. Willoughby*, 345 U.S. 83 (1953), this Court was confronted with similar administrative decisions coming at loggerheads with the asserted rights of a citizen. Therein, this Court concluded:

"... But judges are not given the task of running the Army . . . The military constitutes a specialized community governed by a separate discipline from that of civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters . . . It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of military authorities."
(345 U.S., 93-95)

And in *Gilligan v. Morgan*, *supra*, this Court concludes:

"It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative

and Executive Branches. The ultimate responsibility for these decisions are appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system ...” (37 L.Ed.2d, 415-16).

In May of 1970, both the Legislative and Executive Branches had formulated considered directives concerning the training and weaponry provided the Ohio National Guard. New and advanced policies and equipment will evolve with the inevitable innovation of military technology. These past and future decisions, promulgated by the coordinate political branches of government, must not be exposed to “disruptive” judicial process.

The Scheuer brief is alone in its discussion of *Gilligan v. Morgan*, *supra* (Sch. Br. 35-38). The basic thrust of its argument is that *Morgan* does not foreclose petitioners’ damage actions *in toto*. Respondents do not disagree with this, but contend the petitioners’ specific allegations attacking the propriety of the Ohio National Guard’s training and weaponry are precluded by the *Morgan* precedent.

Morgan asked injunctive and supervisory relief relative to the training and weaponry of the Ohio National Guard. The allegations at hand likewise question the propriety of the Ohio National Guard’s training and weaponry requesting compensatory and punitive damages. Therefore, the only difference between *Morgan* and petitioners’ military allegations is in the relief sought.

It would be wrong to hold the military allegations at bar justiciable in light of the non-justiciable decision in *Morgan*. Certainly the difference in relief sought is not a sound basis for doing so. Indeed, if the propriety of military train-

ing and weaponry was ever to be found justiciable, it would be before the harm had occurred. *Morgan*, however, foreclosed such injunctive relief. An anomaly would result if this Court were to hold that federal courts cannot prevent injury; however, once the injury has occurred, it may be compensated in the federal courts. This Court's ruling in *Morgan* controls the justiciability of petitioners' allegations challenging the propriety of the training and weaponry provided the Ohio National Guard.

V. The Federal Government Is An Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard.

Again, as in the fourth argument, respondents do not argue for the dismissal of petitioners' complaints in their entirety. Rather, it is respondents' position that petitioners' allegations attacking the propriety of the Ohio National Guard's training and weaponry were properly dismissed.²⁴ The Federal Government is an indispensable party to the adjudication of these military allegations as held by the lower appellate court (Sch. Pet. 17a-19a). Rule 19(a) (2) (i) (ii), Fed. R. Civ. P., defines the relevant criteria upon which the Federal Government is determined a necessary party.

First, a disposition of these issues would, as a practical matter, impair and impede the ability of the Federal Government to protect the national interests involved therein. Respondents have previously demonstrated the inextricable involvement of the Federal Government in the training and weaponry of the Ohio National Guard.²⁵ Under the "effect" tests defined by this Court in *Dugan v. Rank*, 372

²⁴Supra note 20.

²⁵See, e.g., Wiener, *The Militia Clause of the Constitution*, supra note 23.

U.S. 609, 620 (1963), there is little doubt but that the Federal Government's functions would be impaired and impeded by the adjudication of these military issues. A judicial determination as to the propriety of the National Guard's training and weaponry would not only interfere with the public administration of the law providing for this training and weaponry [*Land v. Dollar*, 330 U.S. 731, 738 (1947)], but would also restrain the Federal Government from acting and/or compel the Federal Government to act in this critical area vitally affecting national security. [*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).]

Secondly and independent of the above, the officers of the National Guard would face substantial risk of incurring inconsistent obligations. If a judicial decision differed from the directive promulgated by the Department of Army, the officers of the National Guard, pledged to each, would be placed in jeopardy when deciding to which master to pay their allegiance. Pursuant to Rule 19(a) (2) (i) (ii), the Federal Government is a necessary party to petitioners' claims that the Ohio National Guard was improperly trained and armed May 4, 1970.

It stands without citation that the Federal Government cannot be made a party to the adjudication of petitioners' claims concerning the training and weaponry provided Ohio's National Guard. Rule 19(b), Fed. R. Civ. P., contains practical and pragmatic considerations for determining when claims involving necessary parties should be dismissed—the Rule 19(a) necessary parties thus becoming indispensable. *Shaugnessy v. Pedreiro*, 349 U.S. 48, 54 (1955). The ends to be achieved under these pragmatic standards of Rule 19(b) are those insuring equity and good conscience both to the parties of the lawsuit and those necessary parties not at bar.

The equities of Rule 19(b) demand the protection of the Federal Government's interests by dismissing petitioners' allegations concerning the training and weaponry of the Ohio National Guard, leaving petitioners' remaining allegations intact to face respondents' arguments set forth in the earlier sections of this brief.

Only the Krause-Miller brief considers this point, and its argument fails to acknowledge the lower court's narrow holding relative to the issue of the indispensability of the Federal Government.

CONCLUSION

Respondents respectfully submit that the decision of the lower court is correct and must be affirmed. In the first instance, the Eleventh Amendment, United States Constitution, prohibits the federal courts from assuming subject matter jurisdiction. Secondly, and independent of the above, the lower court correctly held that petitioners' complaints fail to state a claim upon which can be granted.

Further, and again independent of the above, those allegations of petitioners' complaints placing in issue the training and weaponry of the Ohio National Guard involve non-justiciable determinations of a political nature. Finally, those allegations specifically mentioned above, demand dismissal since the Federal Government is an indispensable party to their resolution.

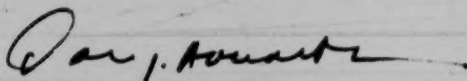
Respectfully submitted,
CHARLES E. BROWN, Counsel of Record
ROBERT F. HOWARTH, JR., Of Counsel
WILLIAM W. JOHNSTON, Of Counsel
DELMAR CHRISTENSEN, Attorney
for Harry D. Jones and John E. Martin
C. D. LAMBROSE, Attorney for
Raymond J. Srp
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Robert F. Howarth, Jr., one of the attorneys for Sylvester Del Corso, Robert Canterbury, Harry Jones, John Martin, Raymond Srp, and Robert White, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of October, 1973, I served three copies of the foregoing Brief of Respondents Del Corso, Canterbury, Jones, Martin, Srp, and White, on the several parties thereto, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record; to-wit:

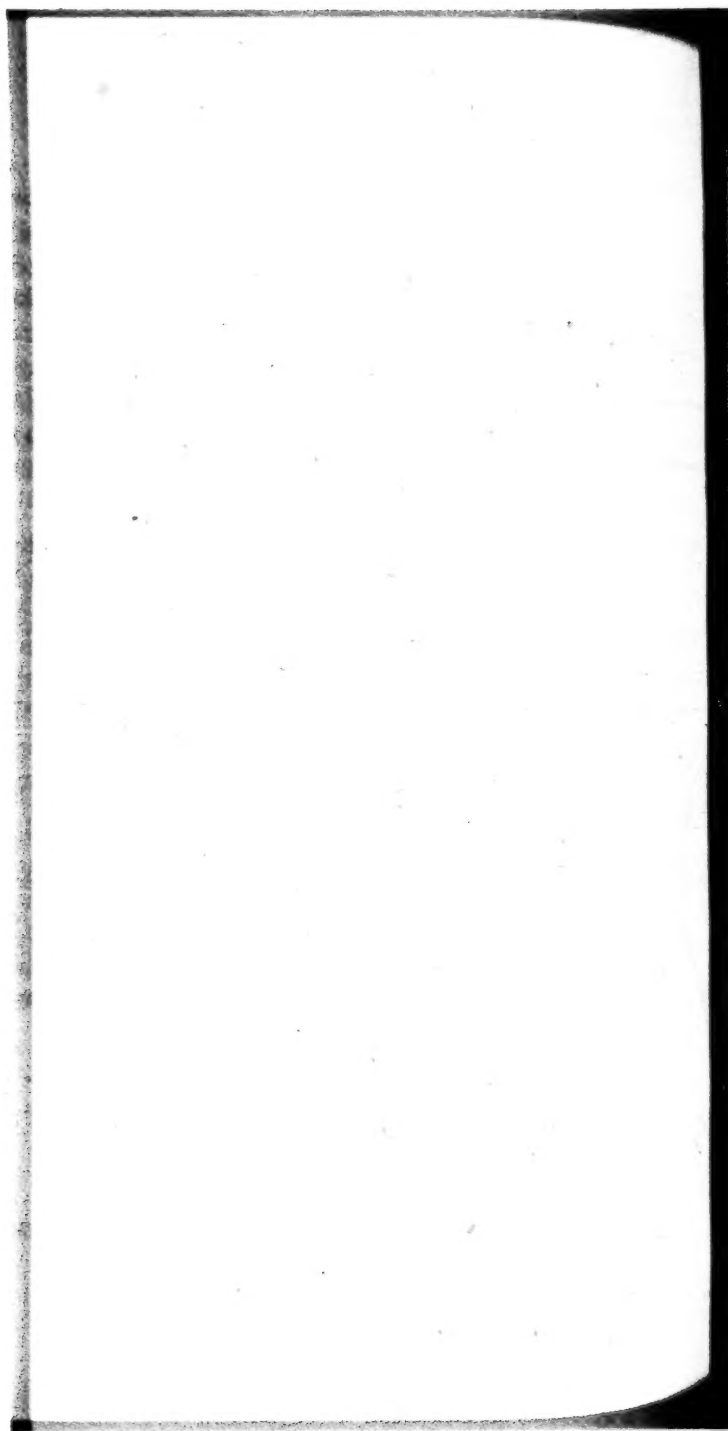
Michael E. Geltner, Esq., and Leonard J. Schwartz, Esq., American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio 43215; Melvin L. Wulf, Esq., and Joel M. Gora, Esq., American Civil Liberties Union Foundation, Inc., 22 East 40th Street, New York, New York 10016; Nelson G. Karl, Esq., 33 Public Square, Suite 210, Cleveland, Ohio 44113, Attorneys for the Petitioner, Sarah Scheuer. Steven A. Sindell, Esq., and Joseph M. Sindell, Esq., Sindell, Sindell, Bourne, Stern and Spero, 1400 Leader Building, Cleveland, Ohio 44114; Joseph Kelner, Esq., Kelner, Stilljes and Glotzer, 217 Broadway, Suite 600, New York, New York 10007, Attorneys for the Petitioners, Arthur Krause and Elaine Miller.

The above named parties are the only parties required to be served.



ROBERT F. HOWARTH, JR.
An Attorney for Respondents,
Del Corso, Canterbury, Jones,
Martin, Srp, Stevenson and White

CRABBE, BROWN, JONES, POTTS & SCHMIDT
42 East Gay Street
Columbus, Ohio 43215
Telephone: (614) 228-5511



Subject Index

	Page
Motion of the Mexican American Legal Defense and Educational Fund for leave to file brief amicus curiae	1
Brief of amicus curiae	7
Interest of amicus curiae	7
Argument	7
I. Sovereign immunity does not bar this law suit	8
II. "Official immunity" does not bar this lawsuit	9
Conclusion	13

Table of Authorities Cited

Cases	Pages
Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921)	11
Barr v. Matteo, 360 U.S. 564 (1959)	12
Bates v. Clark, 95 U.S. 204 (1877)	11
Bishop v. Vanderecook, 228 Mich. 299, 200 N.W. 278 (1924)	11
Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir.), cert. den. 393 U.S. 962 (1968)	9
Fitts v. McGhee, 172 U.S. 516 (1899)	8
Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)	8
Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911)	11
Gilligan v. Morgan, 92 S.Ct. 2440 (1973)	7
Graves v. Barnes, 343 F.Supp. 704 (Jan. 28 1972; W.D. Texas), rev'd in part, aff'd in part, sub nom.	3
Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916)	11
Hernandez v. Texas, 347 U.S. 475 (1954)	2

	Pages
Keyes v. School District No. 1, Denver, Colorado, 37 L.Ed. 2d 548 (1973)	3
Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969)	12
Lane v. Wilson, 307 U.S. 268 (1939)	12
Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851)	11
Monroe v. Pape, 365 U.S. 167 (1961)	7
Moyer v. Peabody, 212 U.S. 78 (1909)	12
Myers v. Anderson, 238 U.S. 368 (1915)	12
Nixon v. Herndon, 273 U.S. 536 (1927)	12
Orr v. Burleson, 214 Ala. 257, 107 So. 825 (1926)	11
O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908)	11
Pierson v. Ray, 386 U.S. 547 (1967)	10
Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. den. 404 U.S. 1049, 405 U.S. 978 (1972)	8, 9
Tenney v. Brandhove, 341 U.S. 367 (1951)	10
White v. Regester, 93 S.Ct. 2332 (1973)	3
Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969)	9

Codes

Ohio Rev. Code S. 5923.22 (Supp. 1972)	7
--	---

Constitutions

United States Constitution:	
Eleventh Amendment	8, 9, 12
Fourteenth Amendment	5, 8

Statutes

42 U.S.C., Section 1983	5, 7, 9, 10, 11, 12, 13
-------------------------------	-------------------------

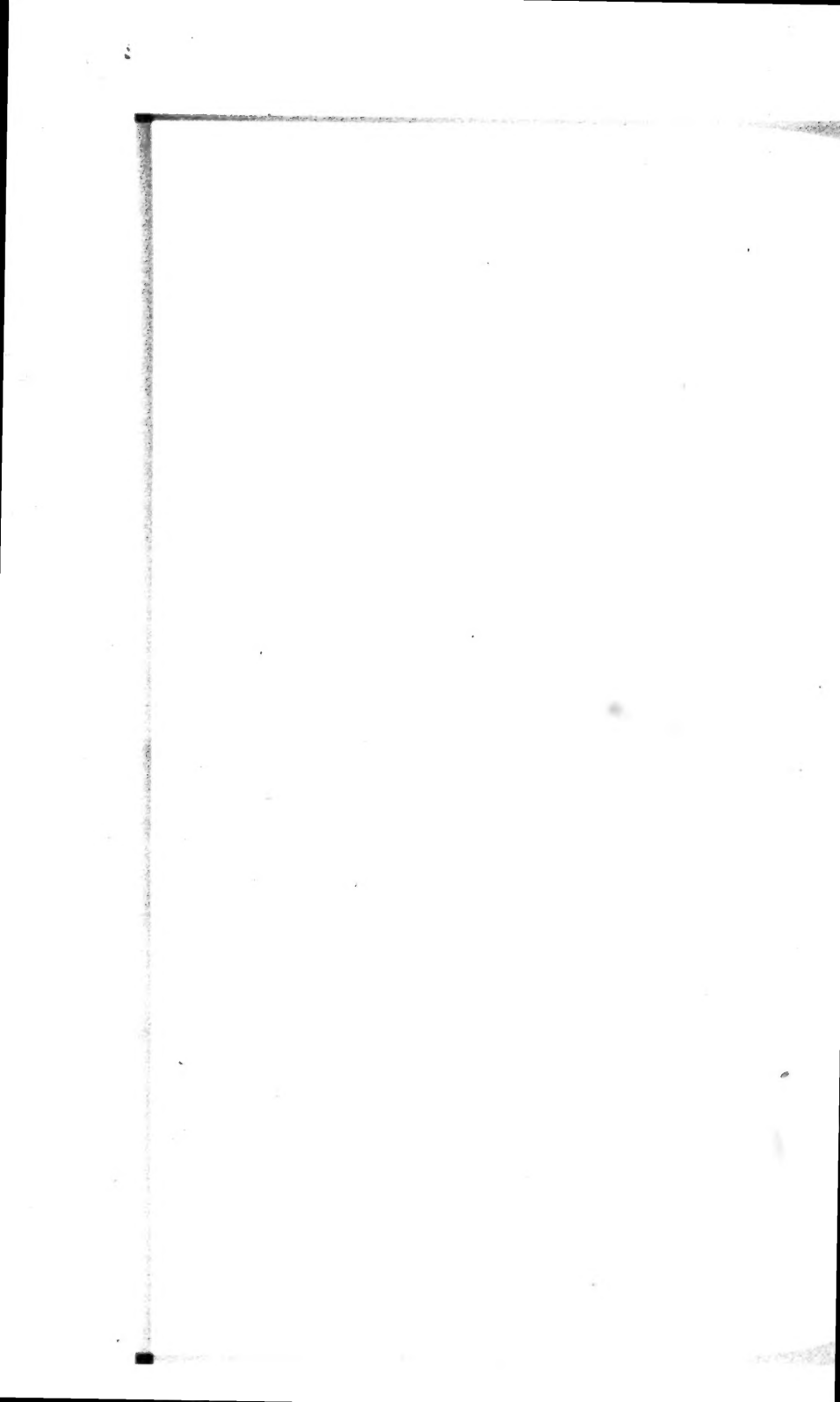
TABLE OF AUTHORITIES CITED

iii

Texts	Pages
L. Grebler, J. Moore, and R. Guzman, <i>The Mexican American People</i> (Free Press 1970)	4
2 F. Harper and F. James, <i>The Law of Torts, 1932-33</i> (1956)	12
C. McWilliams, <i>North From Mexico</i> , p. 197 (Greenwood Reprint Edition 1968)	3
F. Mechem, <i>A Treatise on the Law of Public Offices and Officers</i> , Sec. 610, p. 397 (1890)	12
A. Morales, Ando Sangrando . . . <i>I Am Bleeding</i> (Perspectiva 1972)	4
P. Nabokov, <i>Tijerina and the Courthouse Raid</i> , pp. 108-112, 129-30 (1st ed. University of New Mexico 1969)	3
P. Taft & P. Ross, "American Labor Evidence" in H. Graham and T. Grurr, <i>Violence in America</i> (A Staff Rep. to the Nat'l Com'n on the Causes and Prevention of Violence) pp. 221-301 (U.S. Gov't Printing Office, 1969)	3, 4
J. tenBroek, <i>Equal Under Law</i> , p. 203 (Collier ed. 1965)	8
Wis. L. Rev., <i>The Early Antislavery Background of the Fourteenth Amendment</i> , pp. 610, 648-661 (1950)	8
52 B.U.L. Rev., Waranoff, <i>Federal Judicial Control of the National Guard</i> , pp. 1, 11-27 (1972)	9

Other Authorities

Hearings on Relations Between the Police and Mexican Americans Before the California Assembly Select Committee on the Administration of Justice (1972)	4
Justice, 1961 U.S. Com'n on Civil Rights Report No. 5	4
A Report of the United States Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest (1970)	4
Report of the National Advisory Commission on Civil Disorder, pp. 157-170	4
Report of the National Advisory Commission on Civil Disorder, pp. 275-279 (U.S. Government Printing Office ed. 1968)	3



IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, etc., *Petitioner*,

vs.

JAMES A. RHODES, et al., *Respondents*.

No. 72-1318

ARTHUR KRAUSE, etc., *Petitioner*,

vs.

JAMES A. RHODES, et al., *Respondents*,

and

ELAINE B. MILLER, etc., *Petitioner*,

vs.

JAMES A. RHODES, et al., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals, Sixth Circuit

**MOTION OF THE MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND FOR LEAVE TO
FILE BRIEF AMICUS CURIAE**

The Mexican American Legal Defense and Educational Fund (MALDEF) requested the parties in

these cases to consent to filing the attached brief amicus curiae out of time. The petitioners in both No. 72-914 and No. 72-1318 have granted their consent. All respondents, other than respondent Rhodes, also have consented.¹

MALDEF was established on May 1, 1968, as a non-profit corporation incorporated under the laws of the State of Texas, primarily to provide legal assistance to Mexican Americans. It is headquartered in San Francisco with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C.

MALDEF, in its efforts to assist the Mexican American community achieve its rights under law, has been involved in litigation which has challenged the traditional barriers with which Mexican Americans are faced: abridgement of participatory constitutional and political rights, unequal educational opportunities, discriminatory employment practices, unequal distribution of public services, and police malpractice.

Courts have recognized that Mexican Americans constitute a separate group, often subject to distinct discrimination in today's society. E.g., *Hernandez v. Texas*, 347 U.S. 475 (1954). Quite recently a federal district court surveyed the situation as regards the Mexican Americans in Texas who were represented by MALDEF.

Because of long standing educational, social, legal, economic, political and other widespread and

¹The letters of consent have been filed with the Clerk.

prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican American . . . has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others.

Graves v. Barnes, 343 F.Supp. 704 (Jan. 28, 1972; W.D. Texas), *rev'd in part, aff'd in part, sub nom., White v. Regester*, 93 S.Ct. 2332 (1973). See also *Keyes v. School District No. 1, Denver, Colorado*, 37 L.Ed.2d 548 (1973).

Although the issues presented in these instant cases arise out of the deployment of national guard troops on a midwestern college campus, the national guard has also been deployed against Mexican Americans. See C. McWilliams, *North From Mexico* at 197 (Greenwood Reprint Edition 1968); P. Nabokov, *Tijerina and the Courthouse Raid* at 108-112 and 129-130 (1st ed. University of New Mexico 1969). During the urban ghetto riots of the 1960's it was also deployed, with considerable resort to deadly force, against blacks. See *Report of the National Advisory Commission on Civil Disorder* at 275-279 (U.S. Government Printing Office ed. 1968). And it has been used frequently, again with considerable use of deadly force, to restore order in labor disputes. See generally, P. Taff & P. Ross, "American Labor Evidence" in H. Graham and T. Grurr, *Violence in America* (A Staff Rep. to the Nat'l Com'n on the

Causes and Prevention of Violence) (U.S. Gov't Printing Office, 1969), pp. 221-301. See also, the opinion below in the instant case in *Petition For A Writ Of Certiorari*, Appendix p. 28a (O'Sullivan J., concurring).

Mexican Americans and blacks also have been the victims of summary and abusive treatment inflicted by other state police agencies. One committee of the California Legislature recently convened hearings concerning the relations between the police and Mexican Americans.² Throughout the three days of hearings, this committee was presented with numerous complaints alleging the unrestrained and excessive use of force by inadequately trained law enforcement officials. Furthermore police abuse toward Mexican Americans appears not only to have existed since the latter part of the nineteenth century but also to have been widespread throughout the Southwest. See *A Report of the United States Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest* (1970); L. Grebler, J. Moore, and R. Guzman, *The Mexican American People* (Free Press 1970); and A. Morales, *Ando Sangrando . . . I Am Bleeding* (Perspectiva 1972). As to law enforcement malpractice addressed to blacks, see, e.g., *Report of the National Advisory Commission on Civil Disorder* at 157-170; *Justice*, 1961 U.S. Com'n on Civil Rights Report No. 5.

²Hearings on *Relations Between the Police and Mexican Americans Before the California Assembly Select Committee on the Administration of Justice* (1972).

MALDEF has litigated numerous suits attacking discriminatory and illegal practices of state, county and municipal authorities affecting the lives and liberties of Mexican Americans and other minorities. With few exceptions, challenges have rested upon the irreconcilability of such practices with the spirit and intent of the Fourteenth Amendment to the Constitution and upon the affirmative remedies afforded by Congress under the Civil Rights Statutes, specifically, 42 U.S.C. §1983.

Over the years, this Court has often pointed out that federal court jurisdiction under §1983 must be given broad scope to carry out the purposes for which it was enacted. Since the decision of the Court in this litigation may affect the scope of §1983, MALDEF deems it important to bring to the Court's attention some implications of the issues here presented by respectfully praying leave to file brief *amicus curiae* out of time in support of Petitioners' briefs.

Respectfully submitted,

MARIO G. OBLEDO,

VILMA S. MARTINEZ,

SANFORD JAY ROSEN,

Mexican American Legal Defense

and Educational Fund,

145 Ninth Street,

San Francisco, California 94103,

NICHOLAS WARANOFF,

675 Sharon Park Drive,

Menlo Park, California 94025,

Attorneys for Amicus Curiae.

October, 1973.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the *Amicus Curiae* is set forth in the foregoing Motion.

ARGUMENT

We respectfully urge that the decision below be reversed.³ Although this case arises out of the same tragic events as in *Gilligan v. Morgan*, 92 S.Ct. 2440 (1973), quite different legal questions are presented. This action is simply a form of damage action against police abuse. It is now settled that actions seeking damages to redress illegal arrests, searches, and excessive use of force by police are cognizable in the federal courts under §1983. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). Since the role of the national guard is to assist local police forces, the familiar principles of the police abuse suit should apply here.⁴

³The amicus curiae agrees with the arguments already submitted by the petitioners. In this brief certain alternative arguments are presented.

⁴See Ohio Rev. Code S. 5923.22 (Supp. 1972) (emphasis added): "When there is a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it to be and appear at a time and place therein specified, *to act in aid of the civil authorities . . .*"

See also then Governor Rhodes' Proclamation, printed in appendix to the opinion below, 471 F.2d at 443, reprinted in the Appendix to the Petition for Certiorari at 23 a. ("The military forces involved will act in aid of the civil authorities . . .")

It is clear that one of the foremost purposes of the Fourteenth Amendment was to secure the protection of persons against abuses such as "beatings and woundings, burning and killings . . ."⁵ Moreover, the Fourteenth Amendment was a direct response to the widespread pattern of violence inflicted upon abolitionists and blacks not only before but also after the Civil War.⁶

The court below failed to apply such principles, deciding instead to insulate the entire national guard chain of command—from the Governor to the lowliest private—from liability in damages. That ruling was incorrect, and should be reversed.

I. SOVEREIGN IMMUNITY DOES NOT BAR THIS LAWSUIT

One of the principal grounds relied on below was that this action is barred by the Eleventh Amendment. Prior decisions of this Court and others have uniformly distinguished, for Eleventh Amendment purposes, between damage actions seeking recovery from state officials in their individual or private capacities, and damage actions seeking recovery from the state. In the former situation, the Eleventh Amendment is not a bar to the action. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 461 (1945); *Fitts v. McGhee*, 172 U.S. 516, 528 (1899); *Sostre v. McGinnis*, 442 F.2d 178, 204-05 (2d Cir. 1971) (en

⁵J. tenBroek, *Equal Under Law* 203 (Collier ed. 1965).

⁶*The Early Antislavery Background of the Fourteenth Amendment*, 1950 Wis. L. Rev. 610, 648-661.

banc), cert. denied, 404 U.S. 1049, 405 U.S. 978 (1972); *Whitner v. Davis*, 410 F.2d 24, 30 (9th Cir. 1969); *Board of Trustees of Arkansas A & M College v. Davis*, 396 F.2d 730 (8th Cir.), cert. denied, 393 U.S. 962 (1968). Since this action seeks damages from the defendants in their individual or private capacities, and in no manner seeks any money from the state of Ohio, the Eleventh Amendment simply does not apply here.

Moreover, it is generally a requirement in an action under §1983 that the defendant be a state official. To hold, as the court below appears to have held, that this very fact bars the action under the Eleventh Amendment, even where no damages are sought from the state, would be to nullify §1983. Such a result would be especially aberrant as applied to the defendant enlisted men, commissioned officers, and general officers of the national guard, since it would create an immunity for them where none exists for the police that they are called out to assist.

II. "OFFICIAL IMMUNITY" DOES NOT BAR THIS LAWSUIT

The second principal ground relied on below was that all the defendants have an absolute "executive immunity." This holding too should be rejected.⁷ At the most separate consideration must be given to this question as it applies to the different defendants.

⁷The argument which follows is derived from Waranoff, *Federal Judicial Control of the National Guard*, 52 B.U.L. Rev. 1, 11-27 (1972).

Section 1983 speaks in the broadest terms. Read literally, it imposes liability upon "[e]very person" who commits the wrongs specified in that section; it contains no exceptions and confers no immunities upon particular classes of officials.

Despite this seemingly all-encompassing language of §1983, this Court held in *Tenney v. Brandhove*, 341 U.S. 367 (1951), that a state legislator was immune from litigation under §1983 for acts done within the sphere of legislative activity. The Court noted that legislators had enjoyed immunity from suit for centuries prior to the original enactment in 1871 of what is now §1983, and that nothing in the legislative history of §1983 manifested an intention to abolish this immunity.

Similarly, in *Pierson v. Ray*, 386 U.S. 547 (1967), this Court considered whether state judges were liable under §1983. After determining that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," 386 U.S. at 553-54, the Court could not find any indication in the legislative history of §1983 that this immunity was to be abolished. Hence, the Court concluded that Congress had not intended for §1983 to abolish judicial immunity.

Tenney and *Pierson* establish that the prerequisite to finding an immunity under §1983 is finding such an immunity existed at common law. Accordingly, to determine whether the defendants here are immune

from liability under §1983, resort should be made to the common law.

At common law, national guardsmen enjoyed no immunity from civil liability for their torts. Indeed, it was consistently held that national guardsmen have the same tort liability as police for false arrest, false imprisonment, and illegal search and seizure. *Orr v. Burleson*, 214 Ala. 257, 107 So. 825 (1926); *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916); *Allen v. Gardner*, 182 N.C. 425, 109 S.E. 260 (1921). See also *O'Shee v. Stafford*, 122 La. 444, 47 So. 764 (1908) (state adjutant general held liable for using national guardsmen to interfere with plaintiff's business). Even army officers have been held liable in damages for illegal searches and seizures. *Bates v. Clark*, 95 U.S. 204 (1877); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

There is no reason for applying a different rule to the "constitutional tort" committed by the unjustified use of excessive force in this case. There is, then, no basis for holding that national guardsmen are immune from liability under §1983.

Under common law there is also no body of precedent establishing a general immunity for a state governor.⁸ This alone should be sufficient to refute any

⁸The special rules (see Point III of the Brief of Petitioner in *Scheuer v. Rhodes*, No. 72-914) which govern liability in defamation actions and the need for intragovernment communications, make the decisions in defamation cases against public officials a slender reed upon which to build a broad doctrine of absolute

suggestion that there was a tradition of immunity for governors, comparable to that of judges and legislators, which Congress must have meant to incorporate into §1983. Reinforcing this logic is the fact that it was the opinion of legal scholars at about the time §1983 was enacted that governors enjoyed no immunity:

No case has been discovered in which an action for damages has been sought to be maintained against the governor for his neglect or refusal to perform . . . [a ministerial act], but if he is amenable to mandamus, no satisfactory reason is apparent why he may not be compelled to respond in damages.

F. Mechem, *A Treatise on the Law of Public Offices and Officers*, §610, at 397 (1890); see 2. F. Harper and F. James, *The Law of Torts*, 1932-33 (1956).⁹

Moyer v. Peabody, 212 U.S. 78 (1909), although relied upon below, in fact supports petitioners here. That opinion, which surely represents the high-water mark, if not flood tide, of executive immunity, only conferred a qualified privilege upon the governor, contingent on a showing of good faith.

executive immunity. Moreover, as recognized by the Second Circuit in *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969), cases such as *Barr v. Matteo*, 360 U.S. 564 (1959), are not dispositive . . . when the question of immunity vel non arises in an action brought under a statute, viz. the Civil Rights Act, by virtue of which Congress has already made a policy judgment in favor of imposing liability upon state officials.

⁹See also those cases in which this Court has sustained damage claims against state election officials, although neither the Eleventh Amendment nor "executive immunity" was expressly discussed. *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915).

CONCLUSION

Thorough analysis of the legal principles involved in this case reveals that the courts below rendered erroneous decisions and that Judge Celebrezze who dissented was correct. The judgment below should be reversed as to all respondents and the case should be remanded for a full trial. Any other result will open persons in lawful authority to a powerful temptation to involve the national guard precipitously in civil police functions, to negate thereby enforcement of constitutional protection under §1983.

Respectfully submitted,

MARIO G. OBLEDO,

VILMA S. MARTINEZ,

SANFORD JAY ROSEN,

Mexican American Legal Defense
and Educational Fund,

145 Ninth Street,

San Francisco, California 94103,

NICHOLAS WARANOFF,

675 Sharon Park Drive,

Menlo Park, California 94025,

Attorneys for Amicus Curiae.

October, 1973.

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

Supreme Court, U. S.

FILED

NOV 23 1973

SARAH SCHEUER, Administratrix of The Estate of
Sandra Lee Scheuer, Deceased,

MICHAEL RODAK, JR., CLERK

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY
D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, VARIOUS OFFICERS AND
ENLISTED MEN AND ROBERT WHITE,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. GELTNER
LEONARD J. SCHWARTZ
American Civil Liberties
Union of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

of Counsel:

STANLEY K. LAUGHLIN
NIKI Z. SCHWARTZ
MICHAEL S. HARSHMAN
American Civil Liberties
Union of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation, Inc.
22 East 40th Street
New York, New York 10016

WALTER S. HAFFNER
1008 Standard Building
Cleveland, Ohio 44113

NELSON G. KARL
33 Public Square
Suite 210
Cleveland, Ohio 44113

Attorneys for Petitioner

INDEX

	PAGE
Introductory Statement	1
Scope of Argument	2
ARGUMENTS	
I. Historical Precedents	3
A. Legislative History	3
B. The Common Law	6
C. The Text Writers	10
D. Conclusion to Part I	12
II. Policy Issues	13
A. The Claim of Special Privilege for Execu- tive Officers	13
B. <i>Gregoire v. Biddle</i>	14
C. Loss Shifting	16
D. Conclusion to Part II	18
CONCLUSION	18
Certificate of Service	19

TABLE OF AUTHORITIES

	PAGE
<i>Cases:</i>	
Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966), cert. denied 386 U.S. 1021 (1967)	4, 13
Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)	4
Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967)	14
Darling v. Charleston Hospital, 33 Ill. 2nd 326, 211 N.E. 2nd 253 (1965)	17
District of Columbia v. Carter, 409 U.S. 418 (1973)	6
Ela v. Smith, 71 Mass. 121 (1855)	9
Entick v. Carrington, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765)	8
Escola v. Coca Cola Bottling Co., 24 Cal. 2nd 453 (1944)	16
Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)	12
Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949)	14
Hammond v. Brown, No. 70-998, U.S.D.C. N.D. O., E.D. (Nov. 23, 1970)	16
Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763)	8
Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973)	15
Kawananakoa v. Polyblank, 205 U.S. 349 (1907)	13
Kendall v. Stokes, 44 U.S. (3 How.) 86 (1845)	9
Krause v. Ohio, 31 Ohio St. 2nd 132, 285 N.E. 2nd 736 (1972)	17

	PAGE
Little v. Barreme, 6 U.S. (2 Cranch) 168 (1804)	8
Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972)	4
Luther v. Borden, 48 U.S. (7 How.) 1 (1849)	10
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	11
Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1927)	10
Mostyn v. Fabrigas, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774)	7, 8
Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891)	8
Moliter v. Kaneland Community Unit District No. 302, 18 Ill. 2nd 11, 163 N.E. 2nd 89 (1959)	17
Monroe v. Pape, 365 U.S. 167 (1961)	15
Picking v. Pennsylvania R. Co., 151 F.2d 240 (3rd Cir. 1945)	4
Pierson v. Ray, 386 U.S. 547 (1967)	4
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)	14
Warne v. Varley, 6 Term Rep. 443, 101 Eng. Rep. 639 (1795)	8
Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E. 2nd 342 (1947)	17
Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849)	9
<i>Constitutional Provisions:</i>	
United States Constitution	
First Amendment	13
Eleventh Amendment	17
Thirteenth Amendment	5
Fourteenth Amendment	5

Statutes:

18 U.S.C. §241	5
18 U.S.C. §242 (1866 Act)	5
42 U.S.C. §§1981 and 1982 (Civil Rights Act of April 9, 1866, 14 Stat. 27)	4
42 U.S.C. §1983 (Sec. 1) (Act of April 20, 1871)	6
42 U.S.C. §1985(3) (Sec. 2)	6

Other Authorities:

Cong. Globe, 39th Cong., 1st Sess. 1679 (1866)	4, 5
Cong. Globe, 41st Cong., 2nd Sess. 3611 (1870)	5
Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 333 (1871)	3, 4, 6
Addison, C. G., A Treatise on the Law of Torts 725 (Banks & Bros., N.Y. 1870)	12
Calabresi, G., Some Thoughts on Risk Distribution and The Law of Torts, 70 Yale L.J. 499 (1961)	17
Calabresi, G., The Decision for Accidents: An Approach to Non-Fault Allocation of Costs, 78 Harv. L. Rev. 713 (1965)	17
Cooley, T. M., Treatise on the Law of Torts 379 (Callaghan & Co., 1880)	10, 11
2 Harper, F. and F. James, The Law of Torts 1645 (1956)	15, 17
Hilliard, F., The Law of Torts or Private Wrongs 285 (Little, Brown & Co. 1861)	10
1 Holmes-Laski Letters 189 (Howe Ed. 1953)	13
Holmes, O. W., Jr., The Common Law, Lecture III <i>passim</i> , p. 77 (1881)	16
Keeton, R. & J. O'Connell, Basic Protection for the Traffic Victim <i>passim</i> (1965)	16

Laski, H. J., The Responsibility of the State in England, 32 Harv. L. Rev. 447 (1919)	7, 13
Mechem, F. R., A Treatise on the Law of Public Offices and Officers 390 (Callaghan & Co. 1890)	11
Pollock, F., The Law of Torts 76 (Blackstone Pub. Co., Phila., 1887)	12
Prosser, W., The Law of Torts 987 (4th Ed. 1971)	8, 14
Report of the Secretary's Commission on Medical Malpractice, Department of Health, Education and Welfare, <i>passim</i> (1973)	14
Report, Medical Malpractice: The Patient Versus the Physician, Subcommittee on Executive Reorganization of the Senate Committee on Government Operations, 91st Cong., 1st Sess. <i>passim</i> (1969)	14

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of The Estate of
Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY,
HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP,
VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

Introductory Statement

This brief is submitted by Petitioner in reply to the two respondents' briefs¹ filed in this case and in Number 72-1318. While those briefs are lengthy, Petitioner's reply is limited to a very few of the points discussed in the respondents' briefs.

¹ A red brief was filed on behalf of Respondents Del Corso, Canterbury, Jones, Martin, Srp and White. It will be referred to as the Del Corso brief. A blue brief was filed on behalf of Respondent Rhodes. It will be referred to as the Rhodes brief.

Scope of Argument

Petitioner, in her main brief, argued that, in 1871, when the Civil Rights Act was enacted, there was no historical support for an absolute immunity of executive officers to suit in tort.² In opposition, the Del Corso brief argues that there was in fact common law executive immunity, pointing to several cases which are claimed to support such a rule.³

A portion of this brief will address itself to that issue, summarizing what little legislative history may bear on the point, examining some of the early precedents and surveying the contemporary texts.

In addition, respondents have argued that permitting suit against government officials for deprivation of constitutionally secured rights places the private interest of the injured in opposition to the public interest.⁴ Thus, the Rhodes brief states, "... in an age that has left behind animal sacrifices to the gods, symbolic expiation can be accomplished only at the cost of counter injury to persons or to institutions."⁵

In reply to this line of argument, this brief will consider directly some of the policy implications of the legal principles involved in this case.

² Brief of Petitioner, p. 29 et seq.

³ Del Corso brief, pp. 29-31.

⁴ See, e.g., Del Corso brief, p. 51.

⁵ Rhodes brief, p. 37.

ARGUMENTS

I. Historical Precedents

A. Legislative History

Unfortunately, there is little direct reference in the record of debates in the House of Representatives and Senate in March and April of 1871 to the issue of executive immunity or, for that matter, to immunities in general. The debates centered on less technical matters, such as whether the state of Ku Klux Klan bloodshed in the South was in fact as serious as represented, whether the provisions for sending in federal militia in the event of local breakdown, and for punishing private, conspiratorial interference with rights were constitutional and whether the new law ought to be applied in the north.

The sponsors of the bill argued for a broad grant of jurisdiction to permit the federal government to enforce the liberties of citizens in language which would hardly admit of immunities for wrongdoing State officials. See, e.g., Remarks of Representative Hoar, Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 333 (1871). The only specific mentions of the immunity issues are found in the remarks of opponents of the bill, who assumed that the introductory words, "Every person" admitted of no immunities and, on that basis, argued against its enactment. For example, Representative Arthur of Kentucky, a lawyer, made the following statement in the House:

"But if the legislature enacts a law, if the governor enforces it, if the judge upon the bench renders judgment, . . . for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or

colored, under the pretext of deprivation of his rights, privileges and immunities as a citizen, par excellence, of the United States . . . Hitherto, in all the history of this country, and of England, no judge or court has been held liable . . ." Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 365 (1871).⁶

While the legislative history of the 1871 act, however, provides little direct evidence of the intention of its sponsors on immunities other than the text and its stated purposes, other legislation may give more guidance.

The debates leading to passage of the Civil Rights Act of April 9, 1866, 14 Stat. 27 (now 42 U.S.C. §§1981 and 1982), contain more extensive references to immunities. From those debates it can be understood that a strong majority of the 39th Congress did not see executive immunity as a serious impediment to the proposed Civil Rights legislation, but that it did consider judicial and legislative immunities seriously and specifically rejected such immunities. The 1866 Act was vetoed by President Johnson on March 27, 1866. His stated objection to the bill was that it would remove the immunity of judges and legislators from criminal liability. Cong. Globe, 39th Cong., 1st Sess. 1679 (1866). In the debates leading to the successful vote to override

⁶ See also Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 385 (1871) (remarks of Representative Lewis). The few mentions of immunity in the debates seem to lump judicial and other immunities and assume all are rejected in the act. It has, of course, been pointed out elsewhere that the legislative history does not support judicial immunity. See, e.g., *Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3rd Cir. 1945). See also *Littleton v. Berbling*, 468 F.2d 389, 405 (7th Cir. 1972). Judicial immunity, however, is at least supported by the contemporaneity of the leading decision of the Court in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). See *Pierson v. Ray*, 386 U.S. 547 (1967); *Bauers v. Heisch*, 361 F.2d 581 (3rd Cir. 1966), cert. denied 386 U.S. 1021 (1967).

the veto, Senator Trumbull of Illinois, the bill's principal sponsor, took the issue head on and asserted that, as the bill was written, judges or ministerial officers of court would be punished for active misconduct, but not for innocent mistakes. Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).⁷

In 1870, after adoption of the Fourteenth Amendment, the 41st Congress reenacted the criminal portion of the 1866 Act (presently 18 U.S.C. §242), basing its power on Section Five of the Fourteenth Amendment as well as on the Thirteenth Amendment. It also added what is presently 18 U.S.C. §241, reaching private conspiracies to interfere with civil rights. The debates expose clearly the intention to reach and punish officials' misconduct. The remarks of Senator Pool of North Carolina express this view:

"The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, to subject, or cause to be subjected, any citizen to the deprivation of any of the rights secured and protected by the Act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. . . . There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law." Cong. Globe, 41st Cong., 2nd Sess. 3611 (1870).

⁷ In his remarks directed to legislative immunity, Senator Trumbull argued that a legislator enacting an unconstitutional law does not affect a deprivation of a constitutional right. Rather, the executive officer who executes it does, and it is he who would be liable. See Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

It is conceded, of course, that the interpretation of one of the Civil Rights Acts is not controlling in interpreting a different act. See *District of Columbia v. Carter*, 409 U.S. 418 (1973). Nevertheless, it is fair to assume that the members of the 42nd Congress who deliberated on the 1871 Act must have been aware of the earlier debates and that, having failed to take some positive steps to disassociate the 1871 Act from the earlier Acts' rejection of executive, and other immunities, its sponsors must not have intended to deviate from the earlier Congress' views.

Finally the methodology of the 1871 Act is inconsistent with immunity. The perceived problem was private, vigilante groups injuring white and black alike in the South. The methodology was to reach, with injunctions and damages, the private conduct through Section 2 (now 42 U.S.C. §1985(3)) and the conduct of public officers, such as sheriffs, who failed to prevent or remedy injury, through Section 1 (now 42 U.S.C. §1983).⁸ It is hard to conceive how either sponsors or opponents of this legislation could have seen its object being served by permitting an immunity for the people who enforce State law.

B. The Common Law

The Anglo-American tradition has been to accord a total immunity to the sovereign and none to its officers. Harold Laski summarized the English position as follows:

"The protection taken to the Crown has not, in general, been extended to public officers. 'With us,' says

⁸ A theory supporting Section 1 was that an official who did not act denied equal protection of the laws. See, e.g., Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 334 (Rep. Hoar), p. 506 (Sen. Pratt) (1871).

Professor Dicey, 'every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.' No one can doubt the value of this rule, for it constitutes the fundamental safeguard against the evils of bureaucracy. Nor have its results been of little value. A colonial governor and a secretary of state have been taught its salutary lesson; and it is, as a learned commentator has pointed out, that which makes for the distinction between the policemen of London and the policemen of Berlin. It has the merit of enforcing a far more strict adherence to law than is possible within the limits of any other system. . . ." (footnotes omitted). H. J. Laski, *The Responsibility of the State in England*, 32 Harv. L. Rev. 447, 457-58 (1919).

One outstanding example of the English rule is the decision of Lord Mansfield for the King's Bench in *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774). The plaintiff, a subject of Minorca, a Crown colony, brought suit in the King's Court charging the colonial governor of Minorca with false imprisonment. The governor defended on the ground, *inter alia*, that "the defendant, being governor of Minorca, is answerable for no injury whatsoever done by him in that capacity." 1 Cowp. 171, 98 Eng. Rep. 1027. The Court rejected the plea, with Lord Mansfield stating that ". . . to lay down in an English Court of Justice such a monstrous proposition, as that a governor, acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property,

with impunity, is a doctrine that cannot be maintained." 1 Cowp. 175, 98 Eng. Rep. 1029. To the same effect is *Huckle v. Money*, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763), an action against agents of the Secretary of State, Lord Halifax, in which damages were awarded for assault, trespass and false imprisonment based upon an unlawful warrant to seize the printers of allegedly seditious literature.⁹ See also *Entick v. Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765).

Analysis of the American cases is more complex, partly because of the multiplicity of jurisdictions and partly because it is true that, *in this century*, the prevailing view in most states is to grant immunity to discretionary acts of executive officers.¹⁰ Certainly, many of the American cases of the nineteenth century clearly follow the English rule. Compare *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891) with *Warne v. Varley*, 6 Term Rep. 443, 101 Eng. Rep. 639 (1795). An early American case structurally very similar to *Huckle* and *Entick*, *supra*, is the decision in *Little v. Barreme*, 6 U.S. (2 Cranch) 168 (1804), in which a unanimous Court held that a naval officer could not avoid

⁹ Prosser refers to *Huckle v. Money* and the other actions resulting from the English newspaper raids of that period "as a major blow struck for the freedom of the individual against the abuse of governmental power; and so long as cheap and conniving politicians continue to abuse that power, they should not be forgotten." W. Prosser, *The Law of Torts* 992 (4th Ed. 1971).

¹⁰ See generally W. Prosser, *The Law of Torts* 987 et seq. It is also the prevailing view in this century that no such immunity is available under the Civil Rights Act. See, e.g., cases cited in Petitioner's main brief at p. 28. The dichotomy between the federal rule applicable in Civil Rights Act cases and the one applicable in state court is sensible if it is understood that a federal remedy would probably be unnecessary for constitutional deprivations if there were a viable state remedy.

liability for the unlawful seizure of a neutral vessel on the ground that the President had ordered the seizure.

There are also several American authorities in the nineteenth century which accept the immunity concept for executive officers, although some clearly reach the conclusion by confusing the issue with judicial immunity. See e.g., *Ela v. Smith*, 71 Mass. 121, 136 (1855).

A complicating factor in analyzing the case is that most of the cases accepting a form of executive immunity appear to adopt a qualified, rather than absolute, immunity. In this category, for example, is the decision in *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849).¹¹ The plaintiff, a marine who had signed onto a ship of the United States, was imprisoned and given lashes by the ship's captain when, after the passage of his term of enlistment, he refused to obey orders while at sea. In his action for false imprisonment and battery, the Court held that the defendant captain had acted lawfully in issuing orders to the plaintiff after his term of enlistment and that the punishment given was authorized by an act of Congress. 48 U.S. at 127. Justice Woodbury went on to note that, even if in error, the captain was protected by an immunity. In describing the immunity, however, he defined it as a qualified immunity, to be lost if the captain acted with malice or in excess of his jurisdiction. "In short," he wrote, "it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error." (Citation omitted.) 48 U.S. at 131. *Kendall v. Stokes*, 44 U.S. (3 How.) 86 (1845)¹² is to the same effect.¹³ Thus, to the extent that any executive

¹¹ Discussed in Del Corso brief, pp. 30-31.

¹² Discussed in Del Corso brief, pp. 29-30.

¹³ Chief Justice Taney, in his opinion for the Court stated, "But as the case [before the Court] admits that he acted from a

immunity was recognized in this Court prior to 1871, it was at best a qualified immunity noted in some cases, certainly not a settled practice.¹⁴

C. *The Text Writers*

A possibly fruitful clue to contemporary ideas on immunities can be found in the nineteenth century texts on torts. One source in existence at the time the Civil Rights Acts were considered in Congress was Francis Hilliard's, *The Law of Torts or Private Wrongs* (Little, Brown & Co. 1861). Hilliard's view was as follows:

"It remains very briefly to notice the rights and liabilities of some other public officers. It is remarked in general terms, that 'if a public officer abuses his office,' either by act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer," (footnote omitted). F. Hilliard, *The Law of Torts or Private Wrongs* at 285 (1861).

Judge Cooley, in his *Treatise on The Law of Torts* (Callaghan & Co., 1880) seems to take a contrary position. In

sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him. 44 U.S. (3 How.) at 98-99.

¹⁴ Two other well-known nineteenth century cases resulting in upholding executive action referred to in the Del Corso brief are *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) and *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). Neither, however, deals with immunities. Both cases hold that the factual determination prerequisite to adjudication of the claim against the executive is a non-justiciable, political question, the former under the "Republican Guarantee" clause and the latter as to the presidential determination that there was an "imminent invasion" justifying a call-up of militia.

discussing the liability of executive officials, Cooley states the view "that if the duty which the official authority imposes on an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." T. M. Cooley, *Treatise on The Law of Torts* at 379. In explaining the distinction, Cooley includes "discretionary" functions as public duties and ministerial functions—tasks which would be subject to control by writ of mandamus—as those owed to individuals. *Ibid.*

Cooley states the most extreme anti-liability position found in the nineteenth century texts.¹⁵ Significantly, although there is extensive case citation in Cooley's discussion of judicial and legislative officers, there are no citations in the discussion of executive officers' liability. In another portion, Cooley appears to totally reject the amenability of governors to suit, stating that a governor "could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent." *Id.* at 377.¹⁶

¹⁵ This view is reflected by Mechem, who further phrases the discretionary/ministerial distinction, relying completely on Cooley as his authority for the proposition. See F. R. Mechem, *A Treatise on the Law of Public Offices and Officers* 390-91, 395-97 (Callaghan & Co., 1890).

¹⁶ The quoted portion of Cooley seems to be in direct conflict with the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) that actions of the executive department, when taken in

The remaining treatises strongly reject immunity. Addison, writing in England, concluded that while an executive officer would not be liable for injuries inflicted merely by executing an act of parliament, liability would follow "... if the statutory powers are exceeded, or are not strictly pursued, or the things authorized to be done are carelessly and negligently done . . ." C. G. Addison, *A Treatise on the Law of Torts* 725 (Banks & Bros., N.Y. 1870). Frederick Pollock, likewise, adheres to the common law rejection of immunity. He first notes the rule that an official act is not immunized from judicial inquiry at the behest of an English subject merely because, as against the rest of the world it might be viewed as an act of State. F. Pollock, *The Law of Torts* 76 (Blackstone Pub. Co., Phila., 1887). As to the substantive rule of liability, he concludes:

"The principle which runs through both common law and legislation in the matter is that an officer is not protected from the ordinary consequence of unwarranted acts which it rested with himself to avoid, such as using needless violence to secure a prisoner; but he is protected if he has only acted in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which on the face of it he was bound to obey." *Id.* at 78-79.

D. Conclusion to Part I

In the face of the language of Section One of the Act of April 20, 1871, there should be no absolute—or even qualified—immunity for executive officers unless it is clear that

a manner contrary to law, are in fact subject to control by judicial order. That point had certainly been reiterated at least as recently as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

a majority of Congress so intended or, in the absence of intention, if the common law at time clearly afforded such an immunity. Cf. *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966), cert. denied 386 U.S. 1021 (1967). The legislative history exposes no intention to incorporate executive immunity. In fact such an immunity would have been opposed to the objects of the Act. Moreover, the canon that statutes should not be read in derogation of common law reads against, rather than for, executive immunity. The common law rule rejected immunity, and whatever development was beginning toward a rule of immunity in tort in the United States had not come close to reaching the present position.

II. Policy Issues

A. *The Claim of Special Privilege for Executive Officers*

As the Laski article discussed earlier pointed out, immunity of government and government officials from liability for serious wrongdoing is fundamentally at odds with a democratic regime. H. J. Laski, *The Responsibility of the State in England*, 32 Harv. L. Rev. 447 (1919).¹⁷ There is no sound reason why certain people should be exempt from the rules of law binding all others. The point was made most effectively by Justice Harlan in rejecting the notion that the First Amendment gave an absolute im-

¹⁷ Justice Holmes, in discussing the Laski article, noted his basic "sympathy with the general trend of the article" although he had logical difficulty with suit against the State without consent because it could not be subject to the law which it makes. Letter of March 16, 1919, 1 Holmes-Laski Letters 189-90 (Howe, Ed. 1953). Cf. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.). Holmes' logical difficulty would not, of course, apply to government officers.

munity to publishers from defamation liability. He wrote that "[t]o exempt a publisher [from liability for negligent reporting], because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 160 (1967). See also *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 61, 65-66 (1971) (dissenting opinion of Harlan, J.). Certainly other professions in our society who have claimed, and documented, the fact that liability rules are costly and intimidate them in performing a vital function have not been given an immunity. See, e.g., Report, *Medical Malpractice: The Patient Versus the Physician*, Subcommittee on Executive Reorganization of the Senate Committee on Government Operations, 91st Cong., 1st Sess. passim (1969); Report of the Secretary's Commission on Medical Malpractice, Department of Health, Education and Welfare, passim (1973).

No empirical research has been found which supports the conclusion that persons who enter government service or who run for elective office, are less likely to make negligent or reckless errors in their work than members of other professions or are less likely to use their positions to inflict intentional injury. Nor has it been proved that persons who enter government service or political life are less likely to be venal or to disregard the rights of those subject to their authority. Cf. W. Prosser, *Torts* 992 (4th Ed. 1971).

B. *Gregoire v. Biddle*

Judge Hand argued, in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) that, while malicious or abusive official misconduct ought, in the abstract, to be punished, it was

in fact impossible to separate the *bona fide* claims from the frivolous claims without a trial, and subjecting officials to trial in all such cases would intimidate them, leading to irresolute, passive government. The position is subject to several levels of criticism, not the least of which is that there is no empirical support for the intimidation theory, especially insofar as it postulates intimidation based on mere amenability to suit rather than on liability. Amenability to Civil Rights Act suit of police officers, since *Monroe v. Pape*, 365 U.S. 167 (1961), or of prison guards, see, e.g., *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973) (opinion of Friendly, Ch. J.), has not been demonstrated to retard either of those groups in the legitimate performance of their duties. And it may have had some positive effects. In arguing for a conditional, rather than absolute, immunity to *tort* liability, Harper and James respond to Judge Hand in the following manner:

"Where the charge is one of honest mistake we exempt the officer because we deem that an *actual holding of liability* would have worse consequences than the *possibility of actual malice* (which under the circumstances we are willing to condone). But it is stretching the argument pretty far to say that the *mere inquiry into malice* would have worse consequences than the *possibility of actual malice* (which we would not, for a minute, condone)." 2 F. Harper and F. James, *The Law of Torts* 1645 (1956).

Finally, the assumption behind the absolute immunity claim is that, even in a successful defense, the official suffers the cost of counsel fees and, therefore, will be intimidated by that prospect. It is commonly true, however, that public

counsel appears on behalf of the official charged with wrongdoing, as can be seen from the listing of counsel in many Civil Rights Act damage suits. In the present case, for example, an Attorney General of Ohio has testified that, while private counsel are conducting the defense, the State will pay for it. See testimony of Paul Brown, atty. gen., in *Hammond v. Brown*, transcript pp. 73-77, No. 70-998, U.S.D.C. N.D. O., E.D. (Nov. 23, 1970). What we are left with, then, is the claim that public officials are either too busy or too important to appear in Court when sued.

C. Loss Shifting

In this suit, as in others, an economic loss has been suffered as well as a personal one. Assuming fault, the optimum method of dealing with the economic aspects of the loss would be to shift it to the state where it would be shared with less economic pain by all taxpayers. This loss shifting has, of course, been urged even in the absence of fault. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2nd 453 (1944) (opinion of Traynor, J.). Cf. R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim *passim* (1965). A more basic objective of the Civil Rights Act, however, was to deter official misconduct, the hope being that the officials' fear of liability would prevent them from depriving people of their constitutional rights. Cf. O. W. Holmes, Jr., *The Common Law*, Lecture III *passim*, p. 77 *et seq.* (1881). The optimum reconciliation of these goals would be a system of governmental liability for constitutional deprivations effected by government officials, with a right over of the government against the government official in the event that there is proof of fault,—either negligence, recklessness, malice, or wrongful intention. See 2 F. Harper &

F. James, *The Law of Torts* 1637 (1956). Since that result is blocked as to states like Ohio by the Eleventh Amendment and local rules of immunity, cf. *Krause v. Ohio*, 31 Ohio St. 2nd 132, 285 N.E. 2nd 736 (1972), the rule of no official immunity urged by petitioner would act as a deterrent but apparently would not serve the loss distribution goal. In fact, however, some loss distribution could be effectively served by insurance, because, under a system of liability, officials would have an incentive to insure, while an absolute immunity system would make insurance redundant. The invitation to insure has been followed by many courts as a basis for eliminating immunities. Compare *Darling v. Charleston Hospital*, 33 Ill. 2nd 326, 211 N.E. 2nd 253 (1965) and *Moliter v. Kaneland Community Unit District No. 302*, 18 Ill. 2nd 11, 163 N.E. 2nd 89 (1959) with *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N.E. 2nd 342 (1947). Thus, there is some reason to believe that, in addition to serving deterrence goals, a system of executive officers' liability for constitutional deprivations would aid risk distribution. Moreover, the insurance risk distribution would not come at the cost of deterrence; it has been clearly demonstrated that, in a fault-based system, properly conceived insurance, based on rating commensurate with risk, has the practical effect of increasing the cost of socially undesirable behavior, while rewarding compliance with the law with lower rates. See G. Calabresi, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs*, 78 Harv. L. Rev. 713 (1965); G. Calabresi, *Some Thoughts on Risk Distribution and The Law of Torts*, 70 Yale L.J. 499 (1961).

D. Conclusion to Part II

Executive immunity is essentially the mark of an autocratic regime, fundamentally inconsistent with a republican form of government. The policy justifications commonly offered for executive immunity turn out, on analysis merely to be the protection of privilege for its own sake. The specific goals of the Civil Rights Act, as well as the highly analogous goals of the Law of Torts, are best served by the rule urged by petitioner of no immunity for executive officers, combined with the already established rule of personal liability for constitutional deprivations being based upon fault.

CONCLUSION

The decision below should be reversed, and the Court should remand the case for trial without any rule of immunity.

Respectfully submitted,

MICHAEL E. GELTNER
LEONARD J. SCHWARTZ
MELVIN L. WULF
JOEL M. GORA
NELSON G. KARL

Attorneys for Petitioner

Of Counsel:

STANLEY K. LAUGHLIN
NIKI Z. SCHWARTZ
MICHAEL S. HARSHMAN
WALTER S. HAFFNER

Certificate of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

, being duly sworn, deposes and swears that he served copies on all of the parties required to be served by filing three copies of the attached Reply Brief of Petitioner on The Merits, properly wrapped and stamped, on each of the following:

CHARLES E. BROWN, Esq.
42 E. Gay St.
Columbus, Ohio 43215

R. BROOKE ALLOWAY, Esq.
17 South High Street
Columbus, Ohio 43215

MARIO G. OBLEDO, Esq.
M.A.L.D.E.F.
145 Ninth Street
San Francisco, California 94103

CARL J. CHARACTER, Esq.
1212 Bond Court Bldg.
Cleveland, Ohio 44114

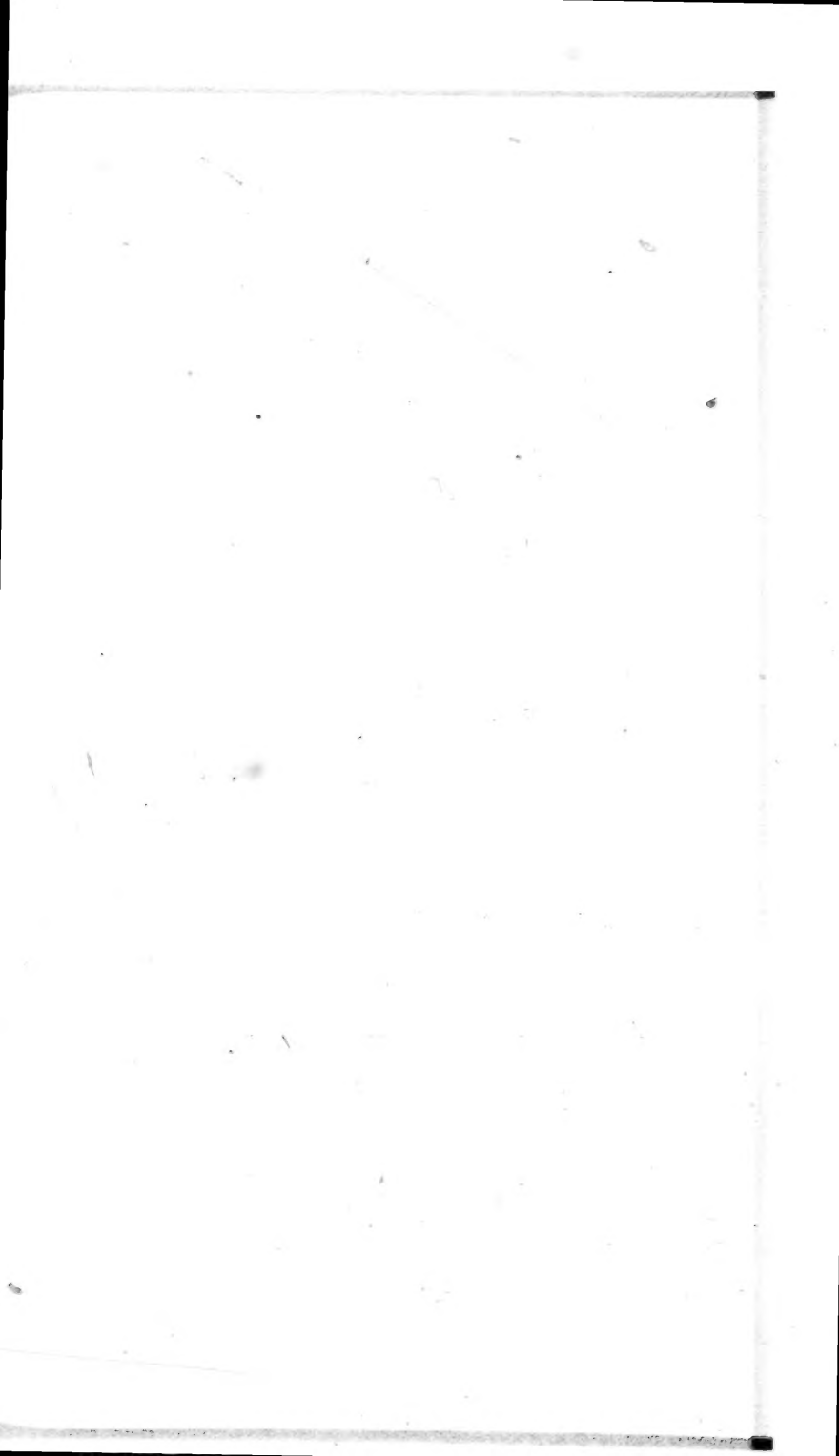
DAVID E. ENGDAHL
4375 Butler Circle
Boulder, Colorado 80303

BENJAMIN B. SHEERER, Esq.
33 Public Square
Cleveland, Ohio 44113

STEVEN SINDELL, Esq.
1400 Leader Bldg.
Cleveland, Ohio 44114

Duly sworn to
before me this
day of November, 1973.

Notary Public



(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHEUER, ADMINISTRATRIX *v.* RHODES,
GOVERNOR OF OHIO, *ET AL.*

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 72-914. Argued December 4, 1973—Decided April 17, 1974*

Petitioners, the personal representatives of the estates of students who were killed on the campus of a state-controlled university, brought these damages actions under 42 U. S. C. § 1983 against the Governor, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted members, and the university president, charging that those officials, acting under color of state law, "intentionally, recklessly, willfully and wantonly" caused an unnecessary Guard deployment on the campus and ordered the Guard members to perform allegedly illegal acts resulting in the students' deaths. The District Court dismissed the complaints for lack of jurisdiction without the filing of any answer and without any evidence other than the Governor's proclamations and brief affidavits of the Adjutant General and his assistant, holding that respondents were being sued in their official capacities and that the actions were therefore in effect against the State and barred by the Eleventh Amendment. The Court of Appeals affirmed on that ground and on the alternative ground that the common-law doctrine of executive immunity was absolute and barred action against respondent state officials. *Held*:

1. The Eleventh Amendment does not in some circumstances bar an action for damages against a state official charged with depriving a person of a federal right under color of state law, and the District Court acted prematurely and hence erroneously in dismissing the complaints as it did without affording petitioners

*Together with No. 72-1318, *Krause, Administrator, et al. v. Rhodes, Governor of Ohio, et al.*, also on certiorari to the same court.

Syllabus

any opportunity by subsequent proof to establish their claims. Pp. 3-6.

2. The immunity of officers of the executive branch of a state government for their acts is not absolute but qualified and of varying degree, depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken. Pp. 6-17. 471 F. 2d 430, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except DOUGLAS, J., who took no part in the decision of the case.

NOTICE : This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 72-914 AND 72-1318

Sarah Scheuer, Administra-
trix, Etc., Petitioner,
72-914 v.

James Rhodes et al.

Arthur Krause, Administra-
tor of the Estate of Allison
Krause, et al
Petitioners,
72-1318 v.

James Rhodes et al.

On Writs of Certiorari to
the United States Court
of Appeals for the Sixth
Circuit.

[April 17, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari¹ in these cases to resolve whether the District Court correctly dismissed civil damage actions, brought under 42 U. S. C. § 1983, on the ground that these actions were, as a matter of law, against the State of Ohio, and hence barred by the Eleventh Amendment to the Constitution and, alternatively, that the actions were against state officials who were immune from liability for the acts alleged in the complaints. These cases arise out of the same period of alleged civil disorder on the campus of Kent State University in Ohio during May 1970 which was before us, in another context, in *Gilligan v. Morgan*, 413 U. S. 1 (1973).

¹ 413 U. S. 919 (1973).

In these cases the personal representatives of the estates of three students who died in that episode seek damages against the Governor, the Adjutant-General and his Assistant, various named and unnamed officers and enlisted members of the Ohio National Guard and the President of Kent State University. The complaints in both cases allege a cause of action under the Civil Rights Act of 1871, 42 U. S. C. § 1983. Petitioner Scheuer also alleges a cause of action under Ohio law on the theory of pendent jurisdiction. Petitioners Krause and Miller make a similar claim, asserting jurisdiction on the basis of diversity of citizenship.²

The District Court dismissed the complaints for lack of jurisdiction over the subject matter on the theory that these actions, although in form against the named individuals, were, in substance and effect, against the State of Ohio and thus barred by the Eleventh Amendment. The Court of Appeals affirmed the action of the District Court, agreeing that the suit was in legal effect one against the State of Ohio and, alternatively, that the common law doctrine of executive immunity barred action against the state officials who are respondents here. 471 F. 2d 430 (1972). We are confronted with the narrow threshold question whether the District Court properly dismissed the complaint. We hold that dismissal was inappropriate at this stage of the litigation and accordingly reverse the judgment and remand for further proceedings. We intimate no view on the merits

² The Krause complaint states that the plaintiff is a citizen of Pennsylvania and expressly invokes federal diversity jurisdiction under 28 U. S. C. § 1332. The Miller complaint states that the plaintiff is a citizen of New York. While the complaint does not specifically refer to jurisdiction under 28 U. S. C. § 1332, it alleges facts which clearly support diversity jurisdiction. (App. 85.) See, Fed. Rule Civ. Proc. 8 (a) (1).

of the allegations since there is no evidence before us at this stage.

I

The complaints in these cases are not identical but their thrust is essentially the same. In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken "under color of state law" and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.

The complaints were dismissed by the District Court for lack of jurisdiction without the filing of an answer to any of the complaints. The only pertinent documentation³ before the court in addition to the complaints were two proclamations issued by the respondent Governor. The first proclamation ordered the Guard to duty to protect against violence arising from wildcat strikes in the trucking industry; the other recited an account of the conditions prevailing at Kent State University at that time. In dismissing these complaints for want of subject matter jurisdiction at that early stage, the District Court held, as we noted earlier, that the

³ In the *Krause* case, the Adjutant General and his Assistant also filed brief affidavits. These seem basically directed to the motion for a change of venue and, in any event, make no substantial contribution to the jurisdictional or immunity questions.

defendants were being sued in their official and representative capacities and that the actions were therefore in effect against the State of Ohio. The primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaint on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well-established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

"[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U. S. 41, 45 (1957) (footnote omitted).

See also *Gardner v. Toilet Goods Assn. Inc.*, 387 U. S. 167, 172 (1967).

II

The Eleventh Amendment to the Constitution of the United States provides: "The judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another

State” It is well-established that the Amendment bars suits not only against the State when it is the named party but when it is the party in fact. *Edelman v. Jordan*, — U. S. — (1974); *Poindexter v. Greenhow*, 114 U. S. 270, 287 (1884); *Cunningham v. Macon and Brunswick R. Co.*, 109 U. S. 446 (1883). Its applicability “is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record.” *Ex parte New York*, 256 U. S. 490, 500 (1921).

However, since *Ex parte Young*, 209 U. S. 123 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

“comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.” 209 U. S., at 159-160. (Emphasis supplied.)

Ex parte Young, like *Sterling v. Constantin*, 287 U. S. 378 (1932), involved a question of the federal court’s injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman v. Jordan*, — U. S. —; *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U. S. 573 (1946); *Ford Motor Company v. Dept. of Treasury*, 323 U. S. 459 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U. S. 47 (1945), damages against individual

defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. *Myers v. Anderson*, 238 U. S. 368 (1915). See generally *Monroe v. Pape*, 365 U. S. 167 (1961); *Moor v. County of Alameda*, 411 U. S. 693 (1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

Analyzing the complaint in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under the color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaint for lack of jurisdiction.

III

The Court of Appeals relied upon the existence of an absolute "executive immunity" as an alternative ground for sustaining the dismissal of the complaint by the District Court. If the immunity of a member of the Executive Branch is absolute and comprehensive as to all acts allegedly performed with the scope of official duty, the Court of Appeals was correct; if, on the other hand, the immunity is not absolute but rather one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence. The concept of the immunity of government officers from personal liability

springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the “King could do not wrong”—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.⁴ This

⁴ In England legislative immunity was secured after a long struggle, by the Bill of Rights of 1689: “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament,” 1 Wm. & Mary, Sess. 2, c. II. See *Stockdale v. Hasard*, 9 Ad. & El. 1, 113-114 (1839). The English experience, of course, guided the drafters of our “Speech or Debate” Clause. See *Tenney v. Brandhove*, 341 U. S. 367, 372-375 (1951); *United States v. Johnson*, 383 U. S. 169, 177-178, 181 (1966); *United States v. Brewster*, 408 U. S. 501 (1972).

In regard to judicial immunity, Holdsworth notes: “In the case of courts of record . . . it was held, certainly as early as Edward III's reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction.” 6 Holdsworth, *The Principles of English Law* 235 (1927). The modern concept owes much to the elaboration and restatement of Coke and other judges of the Sixteenth and early Seventeenth Centuries. 6 Holdsworth, 234 *et seq.* See *Floyd v. Barker*, 12 C. Rep. 23 (1608). The immunity of Crown has traditionally been of a more limited nature. Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. Statute of Westminster I, 1275, 3 Edw. I, C. 24 (repealed); Statute of Westminster II, 1285, 13 Edw. I, C. 6.23 (repealed). The development of liability—especially during the times of the Tudors and Stuarts was slow; see, e. g., Public Officers Protection Act, 1609, 7 Jac. I, 6.5 (repealed). With the accession of William and Mary, the liability of officers saw what Jaffe has termed “a most remarkable and significant extension” in *Ashly v. White*, 1 Brown P. C. 45, 1 Evid. Rev. 417 (H. C. 1703), reversing 6 Mod. 45, 87 Eng. Rep. 880 (Q. B. 1702). Jaffe, L., “Suits Against Governments and Officers: Sovereign Immunity,” 77 Harv. L. Rev. 1, 14 (1963). A. V. Dicey, *The Law of the Constitution*, 193-194 (10th Ed. 1959)

official immunity apparently rested, in its genesis, on two mutually dependent rationales:⁵ (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial processes. The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report or action done in session. U. S. Constitution, Art. I, § 6. See *Gravel v. United States*, 408 U. S. 606 (1972); *United States v. Brewster*, 408 U. S. 501 (1972); and *Kilbourne v. Thompson*, 103 U. S. 501 (1880). This provision was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which had been secured in England in the Bill of Rights of 1689 and carried to the original colonies.⁶ In *United States v. Johnson*, 383 U. S. 169, 182 (1966), Mr. Justice Harlan noted:

"There is little doubt that the instigation of criminal charges against critical or disfavored legis-

(footnotes omitted). See generally *Barr v. Matteo*, 360 U. S. 564. Good faith performance of a discretionary duty has remained, it seems, a defense. See Jaffe, *supra*, at 216. See also *Spalding v. Vilas*, *supra*, 493 *et seq.*

⁵ Jaffe, L., "Suits Against Governments and Officers: Damage Actions," 77 Harv. L. Rev. 209, 223 (1963).

⁶ Mr. Justice Frankfurter noted in *Tenny v. Brandhove*, 341 U. S. 367, 373 (1951): "The provision in *United States Constitution* was a reflection of political principles already firmly established in

lators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause."

Immunity for the other two branches—long a creature of the common law—remained committed to the common law. See, e. g., *Spalding v. Vilas*, 161 U. S. 483, 498-499 (1896).

Although the development of the general concept of immunity, and the mutations which the underlying rationale has undergone in its application to various positions are not matters of immediate concern here, it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating "it is not a tort for the government to govern." *Dalehite v. United States*, 346 U. S. 15, 57 (1953) (dissenting opinion). Public officials, whether Governors, Mayors or police, legislators or judges who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.⁷ Implicit in the idea that

the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege." See *Coffin v. Coffin*, 4 Mass. 1, 27 (1808); See also *Kilbourne v. Thompson*, 103 U. S. 168, 202 (1880).

⁷ For example, in *Floyd v. Barker*, 12 Co. Rep. 23 (1608), Coke emphasized that judges "are to make an account to God and King" since a contrary rule "would tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniation" 12 Co. Rep., at 25. See also: *Yasselli v. Goff*, 12 F. 2d 396, 399 (CA2 1926), aff'd per

officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. In *Barr v. Matteo*, 360 U. S. 564, 572–573 (1959), the Court observed, in the somewhat parallel context of the privilege of public officers from defamation actions, “[T]he privilege is not a badge or emolument of exalted office, but an impression of a policy designed to aid in the effective functioning of government.” See also *Spalding v. Vilas*, 161 U. S. 483, 498–499 (1896).

For present purposes we need determine only whether there is an absolute immunity, as the Court of Appeals determined, governing the specific allegations of the complaint against the Chief Executive Officer of a State, the senior and subordinate officers and enlisted personnel of that State’s National Guard, and the President of a state-controlled university. If the immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U. S. C. § 1983. In neither of these inquiries do we write on a clean slate. It can hardly be

curiam, 275 U. S. 503 (1927). In *Spalding v. Vilas*, 161 U. S. 483, 498, the Court noted:

“In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time; become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.”

argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, 365 U. S. 167 (1961), Mr. JUSTICE DOUGLAS, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of position." *Id.*, at 172. Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.*, at 171-172.

Since the statute relied on thus included within its scope the "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.*, at 184 (quoting *United States v. Classic*, 313 U. S. 299, 326), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe v. Pape*, *supra*, the legislative history is to the contrary. Soon after *Monroe v. Pape*, Mr. Chief Justice Warren noted in *Pierson v. Ray*, 386 U. S. 547 (1967), that the "legislative record [of § 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities," *id.*, at 554. The Court had previously recognized that Civil Rights Act of 1871 does not create civil liability for legislative acts by legislators "in a field where legislators traditionally have the power to act." *Tenney v. Brandhove*, 341 U. S. 367, 379 (1951). Noting that "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of

the Sixteenth and Seventeenth Centuries," *id.*, at 372, the Court concluded that it was highly improbable that ". . . Congress itself a staunch advocate of legislative freedom would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language . . ." *id.*, at 376, of this statute.

In similar fashion, *Pierson v. Ray*, *supra*, examined the scope of judicial immunity under this statute. Noting that the record contained no "proof or specific allegation," *id.*, at 553, that the trial judge had "played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court," *ibid.*, the Court concluded that, had the Congress intended to abolish the common law "immunity of judges for acts within the judicial role," *id.*, at 554, it would have done so specifically. A judge's

"errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on a judge would contribute not to principled and fearless decisionmaking but intimidation." 386 U. S., at 554.

The *Pierson* Court was also confronted with whether immunity was available to that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims under § 1983—the local police officer. Chief Justice Warren speaking for the Court, noted that the police officers

"did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the ['white only'] waiting

room. Rather, they claimed and attempted to prove that . . . [they arrested] solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact [without probable cause and] unconstitutional." *Id.*, at 557.

The Court noted that the "common law had never granted police officers an absolute and unqualified immunity," *id.*, at 555, but that "the prevailing view in this country [is that] a peace officer who arrests someone with probable cause is not liable for a false arrest simply because the innocence of the suspect is later proved," *ibid.*; the Court went on to observe that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Ibid.* The Court then held:

"that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." 386 U. S., at 557.

When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." *Ibid.* In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day de-

cisions—is virtually infinite. In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act.⁸ When a condition of civil disorder in fact exists, there is obvious need for prompt action and decisions must be made in reliance on factual information supplied by others. While both federal and state laws plainly contemplate the use of force when the necessity arises, the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly and association. Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often

⁸ In *Spalding v. Vilas*, 161 U. S. 483, 498 (1896), the Court, after discussing the early principles of judicial immunity in the country, cf. *Randall v. Brigham*, 7 Wall. 523, 535 (1868), *Bradley v. Fisher*, 13 Wall. 335 (1871), and *Yates v. Lansing*, 5 Johns. 282, noted the similarity in the controlling policy considerations in the case of high echelon executive officers and judges:

"We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts."

no consensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. In a context other than a § 1983 suit, Mr. Justice Harlan articulated these considerations in *Barr v. Matteo, supra*:

"To be sure, the occasions upon which the acts of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of 'to matters committed by law to his control or supervision,' *Spalding v. Vilas, supra*, at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U. S., at 573-574.

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief,

that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct. Mr. Justice Holmes spoke of this, stating:

"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event." (Citations omitted.) *Moyer v. Peabody*, 212 U. S. 78, 85 (1909).

Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." *Sterling v. Constantin*, 287 U. S. 378, 397 (1932). In *Sterling*, Chief Justice Hughes put it in these terms:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such

avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." 287 U. S., at 397-398.

Gilligan v. Morgan, supra, by no means indicates a contrary result. Indeed, there, we specifically noted that we neither held nor implied "that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in the judicial forum for violations of law or for specific unlawful conduct by military personnel whether by way of damages or injunctive relief." 413 U. S. 1, 11-12 (1973). (Footnote omitted). See generally *Laird v. Tatum*, 408 U. S. 1, 15-16 (1972); *Duncan v. Kahanamaku*, 327 U. S. 304 (1946).

IV

This case, in its present posture, presents no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, does it permit a determination as to the applicability of the foregoing principles to the respondents here. The District Court acted before an answer was filed and without any evidence other than the copies of the proclamations issued by Respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that "mob rule existed at Kent State University." There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no

evidence before the Court from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. We can readily grant that a declaration of emergency by the chief executive of a State is entitled to great weight but it is not conclusive. *Sterling v. Constantin, supra.*

The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaint places directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.

The judgments of the Court of Appeals are reversed and remanded for further proceedings consistent with this opinion.

MR. JUSTICE DOUGLAS took no part in the decision of this case.

